AMERICAN BENEFITS COUNCIL

May 31, 2022

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

Submitted electronically via www.regulations.gov

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

Dear Sir or Madam:

On behalf of the American Benefits Council ("the Council"), we are writing to express 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.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

As discussed in greater detail below, we are concerned about DOL's proposed procedures. They would, unfortunately, formalize what many of our members have informally come to understand about DOL's recent views towards administrative exemptions. That is, DOL does not feel obligated to grant new exemptions based on existing exemptions, would like to limit application requests, and is not interested in granting new types of exemptions unless there are very compelling policy reasons and no other ways to structure a transaction. This new orientation is concerning because it limits the options that are available to retirement plan sponsors and service providers and is inconsistent with the statutory provisions that authorize DOL to grant exemptions. This is also troubling because the proposed changes would limit DOL's ability to grant exemptions, as necessary, in response to extreme market conditions and changes in retirement industry practices.

The proposal would effectively codify DOL's informal positions by discouraging retirement plan sponsors and service providers from requesting exemptions and approaching DOL with questions about the prohibited transaction rules. The proposal would also unnecessarily narrow the universe of parties and transactions that are eligible for an exemption. In turn, the proposed procedures would significantly limit the ability of plan sponsors and service providers to design and implement retirement offerings that have the potential to improve the retirement security of American workers. We are also concerned about the ways in which the proposal would, through amendments to DOL's application procedures, express DOL's views on broader fiduciary and prohibited transaction issues that are unrelated to the filing of an exemption application and which should be the subject of a separate rulemaking.

While the preamble to the proposal includes a lengthy discussion of the newly proposed conditions and how they will operate to limit the universe of exemption transactions that will be considered and granted, the preamble does not provide data or examples of wrongdoing or abuse to support the proposed tightening of its application procedures. This is concerning because, in the absence of such evidence, DOL's proposed application procedures will arbitrarily create significant roadblocks for retirement plans and participants who would otherwise be able to benefit from an exemption program that has worked well for nearly 50 years. If DOL has concerns with specific transactions or parties, there are more tailored approaches for DOL to reconsider its previously granted relief or pursue enforcement.

BACKGROUND

The prohibited transaction rules under the Employee Retirement Income Security Act of 1974 (ERISA) generally prevent the parties who are responsible for creating and operating employer-sponsored retirement plans from engaging in almost any transaction with a broad array of "parties in interest," which includes just about any person or entity that has any connection to the plan. In other words, Congress began with the premise that almost any transaction with a plan is prohibited. But because such a rule would prevent plans from accessing many beneficial services, investments, and transactions that are necessary for, or beneficial to, the creation and operation of retirement plans, ERISA includes a series of statutory prohibited transaction exemptions. Additionally, ERISA authorizes DOL to grant administrative exemptions when it determines that such relief is: (1) administratively feasible; (2) in the interests of the plan and its participants and beneficiaries; and (3) protective of the rights of participants and beneficiaries of such plans.

For many years following the passage of ERISA, DOL had been willing to exercise this statutory authority to grant, annually, dozens of individual and class PTEs that had been requested by retirement plan sponsors, service providers, and trade associations. These exemptions have provided much needed flexibility to the otherwise rigid prohibited transaction rules imposed by ERISA. To take a simple example, DOL had to issue a class exemption, PTE 2003-39, to confirm that plans can do what every other commercial entity can do – settle claims that the plan has with other parties. As another example, there is a PTE just to allow a plan to receive an *interest-free* loan from a party in interest. One more example: At least until recently, DOL has also provided relief to address consolidation in the financial services industry – for example, the "underwriter" individual exemptions prevent plans that happen to work with large financial institutions from being frozen out from the offering of securities underwritten by affiliates of their adviser or other service providers.

In recent years, however, DOL has become increasingly reluctant to grant administrative exemptions. In 2021, for example, DOL only granted *three* individual exemptions, and in 2020, DOL only granted *one* individual exemption. DOL has only granted *three* class exemptions in the past 15 years (and those three were all in connection with the fiduciary rule). This chilling of the exemption process has discouraged parties from requesting individual relief and prevented plans and service providers from developing new and innovative offerings for retirement savers.

THE PROPOSAL WILL DISCOURAGE APPLICATIONS

Whether or not intended, many of the proposed changes will be viewed as intended to discourage the public from submitting PTE applications. Some examples of changes that are already being viewed by the ERISA community as discouraging applications are changes that would:

- expressly state that the existence of an exemption is not determinative of whether a future exemption will be granted with the same or similar facts;[1]
- expressly state that an exemption will only be granted when administratively feasible "*for DOL*" (emphasis added);
- require all future exemption transactions, by default, to comply with the Impartial Conduct Standards;

[1] This statement is particularly concerning because it puts new market entrants at a disadvantage in relation to parties who were able to request and obtain an exemption in a more favorable regulatory environment under less onerous application procedures.

- require applications to include substantially more information about the proposed transaction, possible alternatives, and the selection of service providers;

- prohibit certain contract terms that could otherwise limit the liability of parties who are involved in exemption transactions; and

- require certain parties involved in exemption transactions to newly prepare documents submitted in support of an application under penalty of perjury.

While we continue to believe DOL *intends* to fulfill its statutory responsibility to grant exemptions that meet ERISA's three requirements, all of these new provisions signal, whether intended or not, that DOL wishes to reduce the number of potential applicants who are interested in seeking an exemption or providing services in support of an exemption or its application.

The Council is very concerned about the collective impact of these changes and how they are likely to discourage future exemption applications. The Council believes that, consistent with congressional intent, administrative exemptions can significantly benefit retirement and welfare plans when they are necessary or beneficial to the creation and operation of appropriate plan offerings or can solve a problem in a way that is in the interests of the plan and its participants and beneficiaries. DOL should not be adding new procedures that will unnecessarily discourage plan sponsors and service providers from submitting applications when an exemption transaction otherwise meets the statutory requirements of being administratively feasible, in the interests of plans and participants, and protective of their rights.

The Council is also concerned about how each of these changes, in application, will substantively impact the design and operation of, and costs associated with, exemption transactions. All of these new conditions are likely to increase the costs associated with exemption transactions, thereby reducing the overall benefits of the exemption and the likelihood of DOL granting an exemption. For example, according to the proposal, a qualified independent fiduciary will be prohibited from including any contract term that provides for its direct or indirect indemnification or reimbursement by the plan or other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the independent fiduciary's work. While well-intentioned, this new condition, among others, will limit the ability of fiduciaries to protect themselves when performing services in connection with exemption transactions. Independent fiduciaries are often involved in difficult and complex situations that can easily lead to litigation. Even if the independent fiduciary doesn't require indemnification for its failures, which our members have told us they typically do not, it will often request advancement of legal fees (usually by the plan sponsor) while the litigation is ongoing. It is unclear whether the advancement of such fees, even if repaid upon an adverse finding to the sponsor, is deemed by DOL to be a form of "indirect indemnification" subject to this broad-based prohibition. We are concerned that if this provision is retained in its current form, plans and participants will have fewer options because fewer responsible firms will be willing, or even able, to serve as qualified independent fiduciaries, and it will be more difficult to achieve lower-cost product innovations through the exemption process.

The Council is also concerned about the provision in the proposal that would newly require qualified independent fiduciaries 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. Before adding any such requirement, we would strongly encourage DOL to collect further data on the availability and cost of fiduciary liability insurance in the market to even well-capitalized fiduciary entities. We understand from our members that the number of carriers offering such coverage is limited. While well intentioned, the text of this new provision also gives limited guidance on the amount of coverage required, and does not give fiduciaries the ability to satisfy this requirement by other means (e.g., sufficient capital).

IMPACT ON EXPRO

As stated above, the Council is concerned about the proposed provision that would state that the existence of an exemption is not determinative of whether a future exemption will be granted with the same or similar facts. One of our concerns with this new regulatory language is how it may be interpreted as limiting or discouraging the use of DOL's "EXPRO" procedures described in PTE 96-62. The EXPRO procedures, which offer an expedited and less costly exemption process for routine transactions that are substantially similar to other transactions that have previously obtained relief, make the exemption process more efficient, less costly, and faster. If DOL retains the troubling language referenced above, we request that DOL expressly clarify that this statement will not affect the ability of parties to use the EXPRO procedures or how DOL will review exemption applications under those procedures.

THE PROPOSAL WILL LIMIT BENEFICIAL DISCUSSIONS WITH INTERESTED STAKEHOLDERS

The Council is also concerned about how the proposed procedures would significantly limit the informal discussions that DOL will be able to have with the public, and the informal discussions that the public will be willing to have with DOL, about ERISA's prohibited transaction rules. These concerns are primarily based on two changes included in the proposed procedures: (1) the new provisions that would bar DOL from communicating with pre-submission applicants on an anonymous basis; and (2) the new provisions that would broadly define the term "pre-submission applicant" to mean a "party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable." Taken together, these changes mean that a party contacting the Office of Exemption Determinations about the application of ERISA's prohibited transaction rules and the potential need for administrative relief will generally be required to identify themselves, and if they do, DOL will create a record of their inquiry that is open to public inspection.

This condition is particularly odd given that the Council's members, especially law firms that represent large employers and service providers, report that officials at the Office of Exemption Determinations are typically being open to at least preliminary conversations about whether an exemption is feasible. ERISA's prohibited transaction rules and their accompanying exemptions are complex, and in many instances, there is very little guidance from DOL on when and how the exemptions apply. For many years, and without identifying their clients by name, ERISA practitioners have been able to help their clients comply with ERISA's prohibited transaction rules, and request relief as needed, by having informal conversations with representatives from the Office of Exemption Determinations about the prohibited transaction rules and their associated exemptions.[2]

By eliminating these anonymous discussions – and clarifying that DOL will make a record that is open to the public when a party inquires "whether a party with a particular fact pattern would need to submit an exemption application, and, if so, what conditions and relief would be applicable" – we are concerned that the proposal will significantly limit the beneficial dialogue that has informally developed between DOL and ERISA practitioners. This would be an unfortunate development in DOL's generally open and inviting relationship with ERISA practitioners, which is roundly appreciated and provides many benefits to plan sponsors and service providers that are impacted by ERISA's fiduciary rules. The Council believes that these unfortunate consequences could largely be avoided if DOL's application procedures continue to permit ERISA practitioners to have preliminary conversations with DOL without identifying their clients by name.

THE PROPOSAL WOULD UNNECESSARILY NARROW THE UNIVERSE OF ELIGIBLE PARTIES AND TRANSACTIONS

The Council is also concerned about the ways in which the proposal would add new conditions that would unnecessarily narrow the universe of parties that are eligible to

[2] We would also point out that, in a related context, the Internal Revenue Service's (IRS) Employee Plans Compliance Resolution System (EPCRS) inherently recognizes the benefits that can result from anonymous conversations between employee benefit plans and regulators. That is, as part of its most recent update of EPCRS, the IRS deliberately preserved the ability of employee benefit plans and their representatives to seek anonymous pre-submission conferences to discuss correction options when an error occurs. *See* Rev. Proc. 2021-30, Section 10.01.

participate in an exemption transaction and the types of transactions that will be eligible.

Unnecessary Limits on Eligible Parties

Under the proposal, DOL generally would not consider the exemption application of any transaction that involves a party in interest who is the subject of an investigation by any regulatory entity under any federal or state laws. This condition is far too broad and will unnecessarily limit the universe of parties that will be eligible to participate in an exemption transaction. For example, large institutions are often under continuous tax audit or examination by a state regulator, which would preclude such entities from applying for an exemption.

Among other persons and entities, a "party in interest" includes any fiduciary, service provider, employer, or employee organization involved in the exemption transaction, as well as the employees, officers, and directors of some of those entities. The limitation described in the preceding paragraph would unreasonably expand the existing bar for parties in interest who are being investigated or charged for ERISA violations to cover any investigation or action by any state or federal regulator. While we can understand concerns with parties in interest who are being investigated or charged for ERISA violations, we do not believe that investigations and actions under statutes or regulations that are unrelated to ERISA or a party's ability to manage or administer an employee benefit plan should generally bar an application's review. The Council does not believe, for example, that the investigation of an employer or service provider regarding environmental regulations should generally prevent DOL from considering an exemption application involving those parties. Similarly, we do not believe that the investigation of a service provider's employee by *any* state or federal regulator should generally prevent the consideration of an exemption application.

Furthermore, we believe that the new information requirements regarding investigations and criminal actions involving the applicant and any qualified independent fiduciary are unnecessary to the extent that they are unrelated to ERISA or other statutes or regulations that are indicative of a party's ability to manage or administer an employee benefit plan. These new disclosures are not necessary to ensure that an exemption transaction meets the statutory requirements of being administratively feasible, in the interests of plans and participants, and protective of their rights.

Valuing Independence Over Competence

As another example, the Council is also concerned about how the proposal would require qualified independent appraisers to be independent of any qualified independent fiduciary, and qualified independent fiduciaries to be independent of any party involved in the development of the exemption request. Further, in the definition of "qualified independent fiduciary," DOL reinforces its view of the primacy of independence by indicating that DOL will consider "whether the fiduciary has an interest in the subject transaction or future transactions of the same nature or type" in determining whether or not to accept the fiduciary's role or conclusions. While we understand DOL's concern with potential conflicts of interest, we would note that a fiduciary **should** be experienced in the area in which it is engaged, a position which has been endorsed both by DOL and the courts in reviewing the requirements of ERISA Section 404. Excluding from consideration parties who are experienced with transactions or situations merely because some party may want to utilize them in a similar circumstance seems an odd requirement for DOL to impose on any fiduciary, since experience and expertise go to the nature of what a "qualified" fiduciary is.

Similar to the discussion above, we are concerned that these new conditions will unnecessarily limit choices for plans and participants by limiting the parties who will be willing to participate in an exemption transaction and increasing the costs associated with exemption transactions. These limitations would also apparently *elevate independence over competence, experience, and expertise.* This change could, for example, prevent qualified independent fiduciaries from selecting appraisers with whom they have developed longstanding and trusted relationships. It is much more important that plans utilize *competent and experienced* fiduciaries and appraisers than ones that have no prior relationship with the parties involved.

BROADER FIDUCIARY AND PROHIBITED TRANSACTION ISSUES

Although DOL's proposal is designed to amend its procedures for accepting PTE applications, the proposal also includes a series of amendments that would apparently express DOL's views on more substantive fiduciary and prohibited transaction issues. This includes amendments addressing the types of expenses that are reasonable fiduciary expenses of administering a plan and the circumstances under which a fiduciary will be independent of the parties involved in an exemption transaction. For example, under the proposal, DOL would presume that a fiduciary does *not* qualify as "independent" if its revenues from the parties involved in the exemption transaction exceed 2% of its revenues, "unless, in its sole discretion, DOL determines otherwise." This change would significantly alter DOL's existing rules that currently: (1) indicate that a fiduciary may be treated as "independent" if its revenues from any party in interest involved in the exemption transaction are not more than 5% of its total revenues; and (2) provide an independence safe harbor if a fiduciary receives fewer than 2% of its revenues from any party in interest.

These above-described amendments address issues that go beyond DOL's exemption application procedures and should be handled as part of a separate rulemaking that can meaningfully consider the more substantive nature of these fiduciary and prohibited transaction questions. Accordingly, we request that DOL remove the proposed amendments addressing these more substantive issues from its current rulemaking focused on its PTE application procedures. In the alternative, if DOL does not remove these changes from its final procedures, DOL should expressly clarify that no inferences should be drawn from its PTE application procedures as to how DOL will interpret ERISA outside of the PTE application process.

If DOL retains its new 2% ceiling on the revenues of qualified independent fiduciaries and appraisers, we are concerned that this new standard will create an unnecessary barrier to entry for fiduciaries and service providers who would otherwise be able to serve as a qualified independent fiduciary under the standards that are present in DOL's existing procedures. This means *less competition and fewer choices* for plan sponsors and others in need of these independent fiduciary providers.

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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 D Dudley

Lynn Dudley
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