INSURED RETIREMENT INSTITUTE

May 31, 2022

VIA ELECTRONIC SUBMISSION

Mr. Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite N-5677
Washington, DC 20210

Re: RIN 1210-AC05: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

Dear Acting Assistant Secretary Khawar:

On behalf of its members, the Insured Retirement Institute ("IRI")[1] appreciates the opportunity to provide these comments to the Department of Labor (the "Department") in response to its Notice of Proposed Rulemaking (the "NPRM") on Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications (the "Proposal").[2]

Based on the concerns set forth below, we respectfully request that the Department withdraw the Proposal and engage in an in-depth dialogue with stakeholders to more fully understand whether and how to modify the current procedures. IRI would welcome the opportunity to participate in such a dialogue with the Department.

[1] IRI is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, broker-dealers, banks, marketing organizations, law firms, and solution providers. IRI members account for 90 percent of annuity assets in the U.S., include the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

[2] 87 FR 14722 (Mar 15, 2022).

Background

The prohibited transaction rules (the "PT Rules") established under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and, together with the corresponding authority granted to the Department to issue exemptions from the PT Rules ("PTEs"), are a core element of the framework established by Congress to regulate retirement plans and accounts.[3] The importance of the PT Rules as a mechanism to protect retirement savers and their beneficiaries cannot be overstated. Likewise, however, the essential nature of the Department's authority to grant PTEs also cannot be overstated. No matter how carefully the PT Rules were crafted, Congress simply could not anticipate and preemptively authorize every legitimate and potentially beneficial transaction or arrangement that might arise in the marketplace. Recognizing that some such transactions and arrangements would inevitably run afoul of the PT Rules, Congress authorized the Department to grant PTEs where it finds 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 plan."[4]

Congress rightfully did not legislate the particular administrative procedures to be employed by the Department in exercising the authority to grant PTEs. Rather, the Department was given the latitude to develop appropriate procedures for itself. The Department initially adopted such procedures (the "Exemption Procedure Regulation")[5] in 1975 and has revised them on several occasions over the subsequent decades. The Proposal represents the Department's most recent effort to adapt the Exemption Procedure Regulation to the evolving market. While this objective is laudable, IRI and its members have significant concerns about several aspects of the Proposal, which we will describe in detail below.

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[3] Under section 102 of Presidential Reorganization Plan No. 4 of 1978, the authority to issue PTEs under section 4975 of the Internal Revenue Code (the "Code") was transferred from the Secretary of the Treasury to the Secretary of Labor. All references herein to the PT Rules, PTEs, the authority of the Department to grant PTEs, and other related matters should be read as referring to the same in the context of ERISA-regulated plans as well as plans and accounts subject to section 4975 of the Code.

[4] 29 USC § 1108(a).

[5] 29 CFR 2570.

Please note that IRI has also received and reviewed the comments on the Proposal submitted to the Department by the Chamber of Commerce of the United States of America (the "U.S. Chamber") and the Securities Industry and Financial Markets Association ("SIFMA") on April 14, 2022, and May 26, 2022, respectively. In addition to the comments and recommendations presented herein, IRI expressly supports and endorses – and respectfully urges the Department to consider – the comments and recommendations made by the U.S. Chamber and SIFMA regarding the Proposal.

The Proposal Meets the Definition of "Significant Regulatory Action" and Should Have Been Subject to OMB Review Before Issuance For Public Comment.

As a preliminary matter, we want to reiterate our perspective on the Department's determination that the Proposal is not a "significant regulatory action" under EO 12866 and thus not subject to review by the Office of Management and Budget ("OMB"). As explained in the letter submitted to the Department on March 23, 2022, by a group of industry organizations including IRI,[6] we believe the Department erred in making this determination and should have sought OMB review before publishing the Proposal for public comment. As stated in the March 23rd letter, "requiring that all applicants adhere to ERISA Section 404(a) and the Impartial Conduct Standards in Prohibited Transaction Exemption 2020-02 (PTE 2020-02) is a novel legal and policy issue that is contrary to DOL's authority, especially with respect to entities that are only governed by the Code."[7]

The Department Should Use its Authority to Grant PTEs to Encourage Innovation Subject to Appropriate Guardrails, but the Proposal Would Institutionalize the Growing and Problematic Predisposition Against the Issuance of PTEs.

One of our most significant concerns regarding the Proposal is that it seems to represent the next step in the significant and problematic tonal shift in the Department's posture towards individual PTE applications over the past several years. According to Groom Law Group, "in the five-year period from 1997 to 2001, DOL issued an average of approximately 90 exemptions per year [but during] the last five-year period (2017 to 2021), DOL granted fewer than 10 exemptions per year (and only 3

[6] https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC05/00003.pdf.

[7] Id.

exemptions were granted in 2021)."[8] This is an extremely troubling trend. While we obviously cannot be certain as to the cause for this shift, it suggests a growing predisposition against the use of innovative new transactions and arrangements by retirement plans and their service providers. Of course, we recognize and support the need for the Department to set appropriate guardrails around innovation in order to protect retirement plans, participants, and beneficiaries. However, we also believe strongly that stifling innovation by refusing to grant PTEs with appropriate conditions in place will deprive retirement plans, participants, and beneficiaries of the opportunities presented by new and innovative ideas.

As explained below, several elements of the Proposal seem to be designed to institutionalize this predisposition against granting individual PTEs. We respectfully urge the Department to conduct a thoughtful and introspective analysis as to whether this trend is (a) consistent with Congress' intent in authorizing the Department to grant PTEs, and (b) necessary to effectively protect plan participants and beneficiaries. IRI stands ready to assist the Department with such analysis and would welcome the opportunity to engage in a more robust discussion on this subject with the Department.

Open and Honest Dialogue Between the Department and Applicants/Potential Applicants Produces Better Outcomes for Plans, Participants, and Beneficiaries, but the Proposal Would Discourage Such Communication.

The NPRM notes that the Department has faced a "recurring problem…when a pre-submission applicant seeks informal guidance from the Department while disclosing an incomplete set of facts and later bases its arguments for an exemption on the Department's informal guidance received before the submission."[9] Though the NPRM does not specify the frequency with which this problem is encountered, we do appreciate the Department's desire to address the issue. However, the solution reflected in the Proposal is, in our view, draconian and excessive.

Put simply, the Proposal would effectively eliminate the ability of applicants and potential applicants to engage in an open and honest dialogue with the Department

[8] DOL proposes to significantly tighten prohibited transaction exemption procedures, Groom Law Group (2022), https://www.groom.com/resources/dol-proposes-to-significantly-tighten-prohibited-transaction-exemption-procedures/ (last visited May 29, 2022).

[9] 87 FR 14722, at 14727.

about the exemptive relief that may be sought and the conditions that might be imposed on such relief. Technically speaking, of course, applicants and potential applicants would be free to engage in such conversations with the Department, but they would have to do so with the knowledge that anything they tell the Department will ultimately be reflected in the administrative record. This fact is certain to have a significant chilling effect on conversations that would otherwise assist applicants and potential applicants in formulating their PTE applications. As a result, we would expect the already lengthy, costly, and cumbersome application process to become even more challenging for both the Department and applicants. Perhaps even more troubling, the likely chilling effect of the approach taken in the Proposal increases the risk that regulated entities will make business decisions that may seem reasonable and appropriate at the time in the absence of feedback from the Department but ultimately prove to be problematic from the Department's perspective through examinations and enforcement actions several years after the fact.

We believe alternative solutions could be formulated to address the Department's underlying concerns that would not have a chilling effect on communication with applicants and potential applicants, and we would be happy to engage in a dialogue with the Department to explore such alternatives.

The Proposal Would Create an Unlevel Playing Field by Allowing the Department to Impose Different Conditions for Exemptive Relief Under Substantially Similar Circumstances.

The Department often emphasizes the importance of fairness and a level playing field as part of the rationale for rulemaking and other regulatory actions. Generally speaking, IRI and its members agree that similarly situated parties should expect to be treated similarly by their regulators. We recognize, of course, that reasonable minds may disagree as to whether particular parties are, in fact, similarly situated, under particular circumstances. This is a question of fact that must be addressed in each individual situation. Where the facts reveal meaningful and relevant differences between applications for exemptive relief, the Department would clearly be justified in imposing different conditions on such relief. In the absence of such meaningful and relevant differences, the conditions to relief should be the same for all applicants.

With this perspective in mind, IRI and its members strongly oppose the proposed addition of paragraph (g) to §2570.30 of the Exemption Procedure Regulation, which

would expressly allow the Department to disregard its own precedents. If the Department opts to proceed with the Proposal despite our request that the Proposal be withdrawn, we strongly urge the Department to remove this provision from any final rulemaking action.

The Conditions to Relief in any PTE Should be Tailored to the Specific Circumstances in Which Such Relief is Requested; Requiring the Inclusion of the Impartial Conduct Standards as a Condition for All PTE Applications is Unnecessary, Inappropriate, and Arguably Beyond the Department's Authority.

As noted above, we understand and appreciate the Department's desire to provide a level playing field for regulated entities. However, the Department takes this objective too far by proposing to require that all PTE applications incorporate the "impartial conduct standards"[10] as a condition of the requested relief (or, alternatively, to persuade the Department that the impartial conduct standards are not needed in a particular circumstance). Even if we assume, for argument's sake, that the inclusion of the impartial conduct standards in PTE 2020-02 was appropriate and within the Department's authority (and as noted in SIFMA's comment letter, there continue to be differing views on this point), we simply do not believe the Department can or should establish a rebuttable presumption that these standards are needed in all other circumstances in which exemptive relief may be sought.

As it reviews individual PTE applications, the Department can certainly assess whether it would be appropriate to require the impartial conduct standards as a condition of the requested exemptive relief. Establishing these standards as a default provision for all PTEs creates a new and unnecessary burden on applicants – who would need to expend time and resources to develop an adequate explanation as to why these standards would not be needed in particular circumstances – without any meaningful benefit to plans, participants, and beneficiaries.

For the foregoing reasons, IRI and its members strongly oppose the proposed addition of paragraph (b)(2) to §2570.34 of the Exemption Procedure Regulation. If the Department opts to proceed with the Proposal despite our request that the Proposal be withdrawn, we strongly urge the Department to remove this provision from any final rulemaking action.

[10] See Prohibited Transaction Exemption 2020-02, Section II(a).

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In sum, IRI and our members understand and support the Department's desire to update its procedures for the filing and processing of PTE applications to keep pace with the evolution of the industry and the marketplace, but we believe the Proposal is significantly flawed and would have an adverse impact on retirement plans, participants, and beneficiaries by discouraging innovation and open dialogue with the Department. As such, we respectfully urge the Department to withdraw the Proposal and re-evaluate whether and how to proceed. We stand ready to assist the Department in this effort.

Thank you again for the opportunity to provide these comments. If you have questions about any of our comments, or if we can be of any further assistance in connection with the Proposal, please feel free to contact either of the undersigned.

Sincerely,

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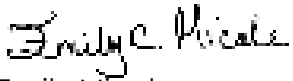

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