THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted Electronically

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Mr. Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

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

Dear Acting Assistant Secretary Khawar:

The ERISA Industry Committee (ERIC) appreciates the opportunity to respond to Notice of Proposed Rulemaking RIN 1210-AC05 (NPRM or proposal), published in the Federal Register on February 14, 2022. We write to offer the views of ERIC large employer member companies, sponsors of employee benefit plans subject to the *Employee Retirement Income Security Act of 1974* (ERISA).

ERIC member companies and the fiduciaries of the plans they sponsor have a significant interest in ensuring that ERISA is administered in a way that allows plans to engage in transactions benefitting plan participants. ERISA's statutory framework not only provides exemptions from certain legal prohibitions regarding plan transactions, but also directs the Department of Labor (Department or DOL) to prescribe a process for facilitating additional exemptions for beneficial transactions that meet certain requirements. This process is intended to promote beneficial transactions involving employee benefit plans.

The Department's NPRM includes provisions that would unfortunately make it less likely for parties to these transactions to seek exemptive relief, and therefore, would make these transactions less likely to occur, which would ultimately have an adverse effect on plan participants by increasing costs. Additionally, we are concerned that if the NPRM is finalized, the Department would no longer rely on precedent, introducing instability to both the law and the benefit plan system.

ERIC is a national nonprofit organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the

voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans and to lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws, in addition to federal law.

Americans engage with an ERIC member company many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

ERIC's member companies provide world class benefits and sponsor health and retirement plans benefitting tens of millions of Americans that often in engage in complex transactions designed for the benefit of participants and beneficiaries.

On behalf of our member companies, ERIC offers the following comments regarding the Department's NPRM which could have negative effects on the ability to efficiently administer these plans.

Comments

The Prohibited Transaction Exemption Process Should Promote Beneficial Transactions Involving Employee Benefit Plans.

Section 404(a)(1) of ERISA generally requires a plan fiduciary to discharge duties solely in the interests of participants and beneficiaries for the "exclusive purpose" of providing benefits and defraying reasonable administrative expenses.[1] In connection with this duty of loyalty, ERISA prohibits a variety of transactions with broadly defined categories of "parties in interest" — even if these transactions are otherwise prudent and beneficial to plan participants.[2] Importantly, however, the statute recognizes that certain exemptions from these prohibitions would be beneficial. And so, the statute enumerates a host of exemptions to permit plans to engage in a variety of transactions.[3]

Congress recognized that the exemptions in the statute were not intended to be exclusive, and the statute explicitly requires the Secretary of Labor to establish an application procedure for granting additional administrative prohibited transaction exemptions (PTEs), to be granted on either an individual or class basis. To grant a PTE, the statute requires the Secretary of Labor to find that the PTE 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 the plan.[4]

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[1] ERISA Sec. 404(a)(1)
[2] *See generally* ERISA Sec. 406 and 407. Section 4975 of the Internal Revenue Code contains substantially similar provisions for transactions involving "disqualified persons" and imposes excise tax penalties for violations. References to ERISA provisions in this letter should also be interpreted as reflecting these parallel provisions of Section 4975, as applicable.
[3] *See generally* ERISA Sec. 408.
[4] ERISA Sec. 408(a).

The statute also contains a variety of other procedural requirements for the PTE process, including publication of notice in the Federal Register, notice to interested parties, the opportunities to comment and for a public hearing in certain circumstances, and a finding on the record with respect to the three conditions listed above.[5] Pursuant to these requirements, the Department has established and refined the required PTE procedure a number of times.[6]

The statute provides the context in which the Department should consider the broader PTE regime**. Since enactment, the statute has provided for PTEs because there has always been a recognition that certain transactions are nevertheless beneficial for participants and beneficiaries**. Indeed, the statutory test for the Department to grant a new PTE relies on that fundamental principal. It is therefore illogical for the Department to make the *process* for applying for PTEs more difficult, as any successful application still must meet the exacting substantive tests. Instead, the Department should welcome the opportunity to facilitate beneficial transactions. For a variety of reasons discussed below, the proposal could well have the opposite effect, and so must be reconsidered.

The Department Should Not Adopt the Proposal's Many Provisions That Would Have a Chilling Effect on the PTE Process.

In our experience, employee benefit plan sponsors and fiduciaries are very concerned with their compliance obligations under ERISA, the Internal Revenue Code, and other applicable laws and regulations, including the prohibited transaction rules. Because of the breadth of ERISA's prohibited transaction rules, exemptions granted by the Department are necessary to ensure effective plan administration.

While preset statutory and regulatory exemptions are helpful, they do not cover all transactions that can benefit plans, and so the individual PTE process is critical to filling that gap. The Department has a long history of granting such individual exemptions to cover a myriad of transactions that benefit plans.

Importantly, the existing process for individual exemptions includes sufficient requirements to ensure the protection of the plan's interests, including that the transaction is in the interests of the participants and beneficiaries of the plan. As such, several provisions of the proposal are unwarranted in that they will serve to discourage PTE applications for such beneficial transactions.

For example, the Department proposes a number of changes that will make it more difficult for applicants to begin a pre-submission conversation to determine the appropriateness of seeking an exemption. These conversations can help potential applicants avoid the expensive cost of an application that is unlikely to succeed, and also save the Department resources. Similarly, pre-submission conversations can help applicants take

[5] *Id.*
[6] *See* NPRM at 14723-24 (reciting the history).

necessary preparatory steps such as hiring vendors (such as independent fiduciaries) the Department will require for the application.

For example, under §2570.30(e) of the proposal, the Department is not bound by feedback it gives to oral inquiries, while at the same time any statement made by the inquiring party is part of an administrative record reviewable by the general public. There is no provision for the inquiring party to be able to review the Department's characterization of any such statement; the existence of this new condition will expose applicants to risk of potentially negative competitive consequences, possibly confuse members of the general public, and discourage potential parties from making an initial inquiry about a PTE application.

Additionally, under §2570.32(d)(1), the administrative record would be open to the general public immediately upon the applicant providing any information or documentation to the Department. And under §2570.32 (d)(2), the administrative record would also include any information submitted to, and accepted by, the Department before the initial application, whether in writing or notes taken by the Department at a pre-submission conference. Again, there does not appear to be a provision for the applicant – or even pre-submission potential applicant – to review these documents. And the publicly available record would include the initial PTE application and any modifications; any correspondence with the applicant or pre-submission applicant; or any supporting information provided by the applicant or pre-submission applicant orally or in writing.

The proposal also includes an unfortunate prohibition on "no-names" preliminary inquiries. Under §2570.33(d) of the proposal, a representative of pre-submission applicant must wholly identify the applicant, the applicable plan(s) and the relevant parties, meaning an attorney or other authorized representative of the inquiring party is required to identify the client even at a very preliminary stage. Without identification of a pre-submission applicant, the Department will refuse to engage – discouraging even basic inquiries to the Department.

In general, the proposal would make it exceedingly more difficult – perhaps even prohibitive -- to even begin the conversation about whether seeking a PTE would be appropriate and limit the helpfulness of the conversations that are had.

An additional provision that requires clarification is proposed §2570.33. Under the proposal, an application for a PTE cannot concern a transaction that is the subject of an investigation for possible violation of federal or state law or involves a defendant under investigation. "Investigation" is not defined in this subpart. This needs to be clarified. If not, it appears that even routine IRS or other governmental audits or unrelated legal inquiries would prevent the issuance of a PTE, which would be an unfortunate result.

Another way the proposal could have a chilling effect on individual exemptions is with respect to the new rules that seek to change the requirements pertaining to independent fiduciaries and independent valuation firms. While the Department's objective of requiring these types of vendors to be independent and not insulated from liability related to their fiduciary activities is appropriate, overly stringent requirements could have the consequence of driving the most capable vendors from the marketplace. This could have another chilling effect on the

availability of individual exemptions, because the Department often requires these vendors play a key role in the PTE process.

The Department Should Reconsider Its Step Away from Using Precedent.

ERIC is also strongly concerned that the proposal will likely have the effect of limiting the role that previously granted individual exemptions as precedent for subsequent applicants, including the availability of "EXPRO" applications under PTE 96-62.

How an agency has previously viewed a question of law is of the utmost interest to any regulated community. It provides important insight into the Department's views that compliance-oriented plans use to seek to comply with the law. In the particular context of prohibited transactions, previously granted exemptions provide guiderails for plans that want to comply with ERISA's prohibited transaction rules. Granted exemptions also are important in making the individual exemption application process efficient and predictable.

The Department currently has a formalized process for utilizing precedent in the context of PTE applications. In PTE 96-62, the Department laid out a test for expedited approval of PTE applications. Under that process, an application would be approved generally if the transaction is "substantially similar" to those described in two prior individual exemptions granted by the Department, and if it presents "little, if any, opportunity for risk of abuse or loss to the plan participants and beneficiaries as a result of the transaction."

Unfortunately, the NPRM would take a step back from this commonsense provision, and more generally remove the role of precedent in the individual exemption process. Under the proposed §2570.30(g), previously issued PTEs are not "determinative" of whether the Department will propose future PTEs. At minimum, this is in tension with PTE 96-62; and at worse, it signals that the Department is moving away from allowing previously granted individual exemptions to serve as precedent. **If it does not clarify, it appears that the Department will not appropriately weigh precedent and past practice when issuing determinations**. This could have implications for market competitiveness and fairness, if like situations are not handled similarly.

ERIC is concerned that if the precedential value of granted exemptions is removed, the application process will take many years and result in the Department establishing *ad hoc* and unexpected requirements in considering application requests. ERIC has already received reports of recent applications for even routine transactions taking several years because of such new requirements. The effect of this movement away from precedent, and the resulting application process becoming more unpredictable and longer, is that fewer plans will likely seek individual exemptions

Instead of introducing new complexity and uncertainty in situations that are not novel or especially controversial, the Department should recommit to relying on precedent and administrative efficiency. To do otherwise would ultimately harm plans and participants by increasing costs and foreclosing opportunities for beneficial transactions.

Conclusion

The prohibited transaction rules serve an important purpose, and ERISA provides a framework for exemptions to help serve plan participants and beneficiaries. ERIC strongly recommends that the Department reconsider several provisions of its proposal amending the process to apply for a PTE as the proposal could deter transactions that otherwise would meet the statute's requirements. Additionally, the Department should be clear that similar situations will be treated consistently, providing much needed certainty and efficiency to this area of the law, and continue to respect precedent in the PTE process.

We look forward to the opportunity to discuss these recommendations in greater detail or to answer any questions.

Sincerely,

Andrew Banducci

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The ERISA Industry Committee