

Via Electronic Delivery

March 24, 2022

Ms. Shalanda Young
Office of Management and Budget
725 17th St NW
Washington, DC 20503

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

Dear Director Young:

The undersigned associations are concerned that Department of Labor (DOL) determined the Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications (NPRM),¹ which imposes novel legal and policy issues seemingly contrary to DOL's authority, is not a significant rulemaking under Executive Order 12866 (EO 12866) and, therefore, not subject to Office of Management and Budget (OMB) review.

Background

Section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) (29 U.S.C. § 1106), prohibits a fiduciary for a plan from entering into a prohibited transaction with a party in interest.² The Internal Revenue Code (Code) also imposes a tax on disqualified persons involved in prohibited transactions.³

Both ERISA and the Code allow the Secretaries of Labor and the Department of the Treasury to grant prohibited transaction exemptions (PTE or PTEs).⁴ DOL has issued procedures, regulations and informal guidance on how to obtain a PTE under both ERISA and the Code.⁵ When the initial regulation was proposed in 1988 and when it subsequently was amended in 2010, the DOL provided a 60-day comment period on the proposals.⁶ Unlike the initial regulation and the subsequent amendment, comments and requests for a hearing on this NPRM are due only 30 days after publication – April 14, 2022.⁷ As explained in our letter to the DOL

¹ Available at <https://www.govinfo.gov/content/pkg/FR-2022-03-15/pdf/2022-04963.pdf>.

² ERISA Section 3(14) (29 U.S.C. § 1002(14)) defines a party in interest to include a specific list of individuals and entities.

³ 26 U.S.C. § 4975.

⁴ ERISA § 408(a) (29 U.S.C. § 1108(a)) and 26 U.S.C. § 4975(c). 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).

⁵ 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).

⁶ 54 Fed. Reg. 24422 (June 28, 1988); 75 Fed. Reg. 53172 (Aug 30, 2010).

⁷ 87 Fed. Reg. 14722 (Mar. 15, 2022).

(attached), given the substantive changes to what on its face is a procedural proposed rule, more time is needed to adequately develop the administrative record.

Significant Rulemaking under EO 12866

Under EO 12866, agencies must determine whether a regulatory action is “significant,” which will subject the action to OMB review. EO 12886 Section 3(f)(4) defines a “significant regulatory action” as an action that is likely to result in “raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the EO 12866.” DOL determined that the NPRM was not “significant,” and, therefore, not subject to OMB review.

Background on the DOL’s history of revising ERISA’s definition of fiduciary is necessary to understand why this NPRM should be considered significant and subject to OMB review. In 2016 DOL finalized a regulation which significantly revised the 1975 definition of an ERISA investment advice fiduciary to plans, participants, beneficiaries, and IRA owners.⁸ Because the expanded fiduciary definition swept in individuals and institutions that were not considered fiduciaries under the 1975 regulation, DOL revised several existing PTEs and issued new ones. One of these exemptions was the “Best Interest Contract Exemption” (BIC Exemption), which required, among other things, that financial institutions adopt policies and procedures to ensure that advisers adhere to the Impartial Conduct Standards, a standard which before the BIC Exemption did not exist.

The U.S. Chamber of Commerce, along with other organizations, challenged DOL’s authority to issue the regulation and new and amended PTEs. The Fifth Circuit vacated both the regulation and PTEs, finding that

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.⁹

DOL subsequently reinstated the 1975 regulation, prior PTEs and removed the BIC Exemption.¹⁰ It also issued Prohibited Transaction Exemption 2020-02 (PTE 2020-02), which 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.

In the NPRM, DOL proposes to require that every application provide a statement that the proposed exemption either will be in the best interest of the plan and its participants and

⁸81 Fed. Reg. 20986 (Apr. 8, 2016).

⁹See Chamber of Commerce of the United States v. Acosta, 885 F.3d 360, 384 (5th Cir. 2018)

¹⁰85 Fed. Reg. 40589 (July 7, 2020).

beneficiaries¹¹ or a statement as to why this standard should not be applicable to the exemption transaction.

Requiring all applicants adhere to ERISA Section 404(a) and the Impartial Conduct Standards in 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. It is also inconsistent with the Fifth Circuit Court of Appeal's decision in Chamber of Commerce of the United States v. Acosta.

Conclusion

Given that DOL through the NPRM is attempting to impose the Impartial Conduct Standard on entities to which it may not necessarily apply and entities beyond its jurisdiction, we request that OMB designate the final rulemaking as significant, subject to OMB review.

Sincerely,

Alternative & Direct Investment Securities Association
American Benefits Council
American Council of Life Insurers
Employee-owned S Corporations of America
The ESOP Association
Financial Services Institute, Inc.
Finseca
Indexed Annuity Leadership Council
Institute for Portfolio Alternatives
Institute for Portfolio Management
Investment Company Institute
Insured Retirement Institute
National Association for Fixed Annuities
National Association of Insurance and Financial Advisors
Securities Industry and Financial Markets Association
U.S. Chamber of Commerce

cc: Dominic Mancini, Deputy Administrator of the Office of Management and Budget's
Office of Information and Regulatory Affairs
Brenda Aguilar, Chief, Food, Health, and Labor Branch of the Office of Management and
Budget's Office of Information and Regulatory Affairs

Encl.

¹¹ The NPRM defines "best interest" as the fiduciary standards under ERISA Section 404(a)(1)(B) in addition to requiring 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." NPRM § 2570.34(b)(2)(iii). The DOL explains that this section "generally incorporates compliance with impartial conduct standards as formalized in Prohibited Transaction Exemption 2020-02 as a baseline condition for approved exemptions." 87 Fed. Reg. 14728.

Via Electronic Delivery

March 23, 2022

Mr. Ali Khawar
Acting Assistant Secretary
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

Dear Acting Assistant Secretary Khawar:

On behalf of the undersigned organizations, we request an extension of time from 30 to 60 days to comment on the Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemptions Applications (NPRM). As explained below, unlike most administrative procedures, this NPRM contains substantive provisions that raise novel legal and policy issues, which require substantial time and effort to evaluate and comment on the impact it could have to the regulated community and retirement savers. Furthermore, given these substantive changes, we request that the Department of Labor (DOL) reexamine its determination that the NPRM is not “significant” under Executive Order 12866 (EO 12866).

Background

Since the enactment of the Employee Retirement Income Security Act of 1974, as amended (ERISA), DOL¹² has issued procedures, regulations and informal guidance on how to obtain a prohibited transaction exemption (PTE) under ERISA Section 408 (29 U.S.C. § 1108).¹³ When the initial regulation was proposed in 1988 and subsequently amended in 2010, DOL provided a 60-day comment period on the proposals.¹⁴

This NPRM was published in the Federal Register on March 15, 2022, and it would “supersede the Department of Labor’s ...existing procedure governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (the Code), and the Federal Employees’ Retirement System Act of 1986 (FERSA).”¹⁵ Unlike the

¹² 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).

¹³ 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).

¹⁴ 54 Fed. Reg. 24422 (June 28, 1988); 75 Fed. Reg. 53172 (Aug 30, 2010).

¹⁵ 87 Fed. Reg. 14722 (Mar. 15, 2022).

initial regulation and subsequent amendment, comments and requests for a hearing on this NPRM are due only 30 days after publication – April 14, 2022.

Although 30 days may be sufficient time to comment on a purely procedural proposed rule, given the substantive changes within these procedures, we are respectfully requesting at least a 60-day comment period. A shorter comment period would impair our ability to analyze and provide full input on the proposed changes, and it also creates a substantial risk that there will be an incomplete administrative record.

A 30-Day Comment Period Is Insufficient Because of the Significant Substantive Changes

There are many substantive changes in the NPRM that require additional time to review, evaluate, and provide comments on. These changes include, but are not limited to:

- Requiring a statement that every proposed exemption either will be in the best interest of the plan and its participants and beneficiaries¹⁶ or a statement as to why this standard should not be applicable to the exemption transaction;
- Requiring a higher level of scrutiny for retroactive exemption applications;
- Stating that merely because DOL issued a previous exemption on a transaction does not mean they will issue an exemption for a similar transaction with the same conditions because all exemptions are issued at DOL’s discretion;
- Making “substantive revisions to several existing definitions and add[ing] new definitions”,¹⁷ such as affiliate, control, independent fiduciary and qualified independent appraiser, which now includes a review of the appraiser’s and fiduciary’s projected revenues relating to the proposed exemption;
- Expanding ERISA Section 406’s prohibition on certain transactions to parties other than a “party in interest” as defined in ERISA Section 3(14);
- Stating that DOL will not consider any applications if the transaction or a party in interest is being investigated under any Federal or state laws; and
- Warning that any information provided by the applicant cannot be deemed confidential and would be made available to the public.

These and other substantive issues will require additional time to develop meaningful public comments. We therefore request DOL provide stakeholders with a 60-day comment period to

¹⁶ As the Department is aware, the “best interest” standard has only recently been adopted by DOL through rulemaking 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). The NPRM defines “best interest” as the fiduciary standards under ERISA Section 404(a)(1)(B) in addition to requiring that 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.” NPRM § 2570.34(b)(2)(iii). The DOL explains that this section “generally incorporates compliance with impartial conduct standards as formalized in Prohibited Transaction Exemption 2020-02 as a baseline condition for approved exemptions.” 87 Fed. Reg. 14728.

¹⁷ 87 Fed. Reg. 14725 (Mar. 14, 2022).

allow for a full examination of the substantive changes, and an evaluation of the impact of the proposed changes on the exemption process.

Significant Rulemaking under EO 12866

Under EO 12866, agencies must determine whether a regulatory action is “significant,” which will subject the action to Office of Management and Budget (OMB) review. EO 12886 Section 3(f)(4) defines a “significant regulatory action” as an action that is likely to result in “raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the EO 12866.”

DOL determined that the NPRM was not “significant,” and, therefore, not subject to OMB review. However, as explained below, 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.

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. Applying the “best interest” standard to all PTE transactions regardless of the transaction involved through a procedural requirement creates a new substantive, legal policy.

Although the DOL has authority to issue PTEs under the Code, it does not have authority to impose ERISA’s substantive requirements on entities that are not subject to ERISA. DOL’s proposal to effectively apply ERISA section 404(a) and PTE 2020-02’s Impartial Conduct Standards to entities not governed by ERISA also is inconsistent with the Fifth Circuit Court of Appeal’s decision in Chamber of Commerce of the United States v. Acosta, which vacated DOL’s 2016 fiduciary rulemaking. The 2016 rulemaking attempted to impose the Best Interest Contract Exemption’s Impartial Conduct Standards on non-ERISA entities and transactions.¹⁸

Conclusion

Given the myriad substantive changes in the NPRM and the novel legal and policy theories also involved, not only do the undersigned request additional time to comment on the NPRM, but we also request DOL reevaluate whether the ruling is significant under EO 12866.

Sincerely,

Alternative & Direct Investment Securities Association
American Benefits Council

¹⁸See 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.”)

American Council of Life Insurers
Employee-owned S Corporations of America
The ESOP Association
Financial Services Institute, Inc.
Finseca
Indexed Annuity Leadership Council
Institute for Portfolio Alternatives
Institute for Portfolio Management
Investment Company Institute
Insured Retirement Institute
National Association for Fixed Annuities
National Association of Insurance and Financial Advisors
Securities Industry and Financial Markets Association
U.S. Chamber of Commerce