

MEMO# 34068

March 9, 2022

DOL Proposes Changes to Prohibited Transaction Exemption Application Procedures

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Proposes Changes to Prohibited Transaction Exemption Application Procedures

The Department of Labor (DOL) is proposing amendments to the procedures governing the filing and processing of prohibited transaction exemption applications.[\[1\]](#) The project appeared on DOL's Fall 2021 Regulatory Agenda with the stated goal of improving operation of the prohibited transaction exemption program.[\[2\]](#) Of particular significance, the amendments would require incorporation of the "impartial conduct standards" (as formalized in Prohibited Transaction Exemption 2020-02)[\[3\]](#) as a baseline condition for approved exemptions.[\[4\]](#)

Background

ERISA section 408(a) authorizes DOL to grant administrative exemptions from the prohibited transaction restrictions of ERISA sections 406 and 407(a), if the relief is found to be (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.[\[5\]](#) Such exemptions may be granted on either an individual or a class basis. DOL last updated the exemption procedure regulation in 2011.[\[6\]](#)

Proposed Changes

DOL intends the proposed changes to improve both the regulation's readability and the substantive operation of the program. The proposed changes include:

- Clarification of the relevant factors and overall high level of scrutiny that will apply to consideration of any retroactive exemption application.
- Clarification of how DOL will handle oral inquiries.
- Clarification of the types of information and documentation required to complete an application.

- Clarification of the content of specific reports and documents applicants must submit to ensure DOL receives sufficient information to make the requisite findings under ERISA section 408(a) to issue an exemption.^[7]
- Incorporation of compliance with the "impartial conduct standards" (as formalized in Prohibited Transaction Exemption 2020-02)^[8] as a baseline condition for approved exemptions.^[9]
- Several revised definitions, including the definitions of "affiliate," "qualified independent fiduciary," and "qualified independent appraiser."
- Updated timing requirements to ensure clarity in the application review process.
- Specification of which items are included in the administrative record for an application and the timing of when the administrative record is available for public inspection.
- Clarification that DOL will not review an application that includes information the applicant claims as confidential, with an exception for confidential designations by a federal state, or other governmental entity.
- Expanded opportunities for applicants to submit information to DOL electronically.

Comments will be due 30 days after the proposal is published in the Federal Register (no indication was given on the timing of publication).

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endnotes

^[1] A pre-publication version of the proposed regulation is available here: <https://www.dol.gov/sites/dolgov/files/ebsa/temporary-postings/proposed-amendment-to-prohibited-transaction-exemption-filing-and-processing-procedures.pdf> and a news release is available here: <https://www.dol.gov/newsroom/releases/ebsa/ebsa20220308>.

^[2] See ICI Memorandum No. 33969, dated December 20, 2021, available at <https://www.ici.org/memo33969>.

^[3] See ICI Memorandum No. 32999, dated December 18, 2020, available at <https://www.ici.org/memo32999>.

^[4] See note 9 *infra*.

^[5] A parallel provision appears in section 4975(c) of the Internal Revenue Code, over which DOL has authority pursuant to Presidential Reorganization Plan No. 4 of 1978.

^[6] 76 FR 66637 (October 27, 2011). The exemption procedure regulation appears at 29 CFR 2570.30 *et seq.*

^[7] Among other things, the proposal would require the applicant to include a description of: (1) the reason(s) for engaging in the exemption transaction; (2) any material benefit that a party involved in the exemption transaction may receive as a result of the subject transaction (including the avoidance of any materially adverse outcome by a party as a result of engaging in the exemption transaction); and (3) the costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible. It also would require

applicants to provide a detailed description of possible alternatives to the exemption transaction that would not involve a prohibited transaction and why the applicant did not pursue those alternatives, and a description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted.

[8] See ICI Memorandum No. 32999, dated December 18, 2020, available at <https://www.ici.org/memo32999>.

[9] The proposal states, however, that DOL recognizes that the impartial conduct standards may not be appropriate or necessary in all exemption transactions, and therefore applicants may affirmatively explain why the impartial conduct standards should not be applicable to their exemption transactions.

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