

MEMO# 34166

May 31, 2022

ICI Submits Comment Letter in Response to DOL's Proposed Changes to Prohibited Transaction Exemption Application Procedures

[34166]

June 1, 2022

TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: ICI Submits Comment Letter in Response to DOL's Proposed Changes to Prohibited Transaction Exemption Application Procedures

On May 31, 2022, the Institute sent the attached comment letter to the Department of Labor (DOL) in response to its proposed amendments to the procedures governing the filing and processing of prohibited transaction exemption (PTE) applications.[\[1\]](#)

In the proposal, DOL proposes changes to its procedures that would significantly modify the process and formally codify new additional burdens on applicants and independent fiduciaries covered by the exemption. Of particular significance, the amendments would require incorporation of the "impartial conduct standards" (as formalized in Prohibited Transaction Exemption 2020-02)[\[2\]](#) as a baseline condition for approved exemptions.

ICI's letter expresses concerns regarding the proposal and explains that the changes will make it more difficult and expensive to apply for a PTE and put in doubt the success of an application. The letter addresses the following aspects of the proposal:

- The proposed changes regarding pre-submission discussions with DOL will significantly limit the mutually beneficial dialogue that has developed between DOL and the regulated community about potential transactions that may be considered to implicate ERISA's prohibited transaction rules.
- The proposed changes to the requirements for independent fiduciaries and appraisers—including new revenue thresholds for determining "independence," a requirement to be independent of any qualified independent fiduciary and not merely the applicant, and a requirement that the independent fiduciary maintain fiduciary liability insurance in an amount that is sufficient to indemnify the plan for damages

resulting from a breach by the independent fiduciary—would unnecessarily reduce competition, increase costs, and create uncertainty.

- The costs associated with the proposed changes' new information requirements will create barriers of entry to the exemption process except for the largest applicants, resulting in the elimination of transactions that would otherwise be commercially beneficial, and consequently will reduce plan investment returns.
- The provision that DOL generally would not consider the exemption application for 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—including 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—would unnecessarily narrow the universe of parties that are eligible to participate in an exemption transaction and the types of transactions that will be eligible.
- The proposed changes would limit the universe of exemption transactions that will be considered and granted, but DOL fails to consider the impact on retirement plans and their participants in accessing beneficial services, investments, and transactions that are necessary for, or beneficial to, their creation and operation.
- Collectively, these changes will make it more difficult and expensive to apply for a PTE and put in doubt the success of an application—discouraging parties from even applying; the changes will restrict the ability of the regulated community to obtain exemptions for transactions that facilitate efficient plan administration, and provide for favorable investments, to the detriment of retirement plans and their participants.

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endnotes

[1] See ICI Memorandum No. 34068, dated March 9, 2022, available at <https://www.ici.org/memo34068>. The comment period was originally scheduled to be open for only 30 days, and ICI joined several other trade organizations in a letter requesting that DOL extend the comment period to 60 days. see ICI Memorandum No. 34087, dated March 25, 2022, available at <https://www.ici.org/memo34087>. In response, DOL extended the comment period for an additional 45 days, through May 29, 2022. See ICI Memorandum No. 34108, dated April 12, 2022, available at <https://www.ici.org/memo34108>.

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