

**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), DOL<sup>1</sup> 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).<sup>2</sup> When the initial regulation was proposed in 1988 and subsequently amended in 2010, DOL provided a 60-day comment period on the proposals.<sup>3</sup>

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).”<sup>4</sup> Unlike the

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<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 54 Fed. Reg. 24422 (June 28, 1988); 75 Fed. Reg. 53172 (Aug 30, 2010).

<sup>4</sup> 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 beneficiaries<sup>5</sup> 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",<sup>6</sup> 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

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<sup>5</sup> 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 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.

<sup>6</sup> 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.<sup>7</sup>

### 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

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<sup>7</sup>See Chamber of Commerce of the United States v. Acosta, 885 F.3d 360, 384 (5<sup>th</sup> 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.”)

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The Employee-owned S Corporations of America  
The ESOP Association  
Financial Services Institute, Inc.  
Finseca  
Indexed Annuity Leadership Council  
Institute for Portfolio Alternatives  
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Investment Company Institute  
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U.S. Chamber of Commerce