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May 31, 2022

The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: RIN 1210-AC05, Docket ID number EBSA-2022-0003
Suite 400
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Submitted Electronically via Federal eRulemaking Portal:
www.regulations.gov

Re: RIN 1210-AC05, Proposed Amendment to Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

Acting Assistant Secretary Khawar:

We appreciate the opportunity to comment on the Department's Proposed Rule (the "Proposal") amending the current Exemption Procedure Regulation governing the prohibited transaction exemption process. We are very concerned that this "procedural" rule is, in fact, a substantive, policy-making rule that will affect the ability of ERISA plan participants and IRA owners to access professional assistance in making financial security decisions. We offer our comments below and urge the Department to acknowledge that this is a "significant" rulemaking under Executive Order 12866.

Who We Are:

Finseca's mission is to create an environment that enables people to protect and enhance financial well-being — for themselves, their families, and their businesses. Finseca represents and serves the entire financial security profession, regardless of role, marketplace, or experience and its members provide life insurance and retirement planning solutions that protect the dreams and promote the prosperity of the American people. **Financial Security for All**.

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Americans who work with a financial security professional achieve better financial outcomes. At its core, financial security starts with having a plan – one that is tailored to the needs and objectives of each individual – and having access to advice to successfully navigate the unknowns of life and execute their plan.

When it comes to saving for retirement, Americans overwhelmingly[1] prefer to work with a financial security professional of their choosing to ensure their retirement needs are met.

Executive Summary:

While most people probably have never heard of prohibited transaction exemptions, they are vitally important to the financial security of millions of Americans. Americans saving in their 401(k)s, IRAs and similar retirement vehicles need access to financial professionals of their choice who can assist them in selecting insurance, annuities and investments crucial for their financial security. However, due to the complexity of ERISA rules, there are barriers that can make it difficult to get help. Exemptions are necessary to remove barriers that would otherwise prevent access to advice and assistance.

That's why this Proposal matters—it governs the exemption process. Unfortunately, the Department is using the Proposal to "bake in" major policy decisions about financial security that go well-beyond "process," many of which were already rejected by the 5th Circuit Court of Appeals in vacating the 2016 DOL Fiduciary Rule and associated exemptions.[2]

Specifically, we are concerned that:

- The Proposal should be reclassified as a "significant" rule under EO 12866 with a proper analysis of its materially negative impact on plans, participants, and small businesses;
- The Proposal tries to implement new conduct standards for all future exemptions, when the conditions of each exemption must be considered on a case-by-case basis;
- The Proposal tries to implement new conduct standards that conflict with existing SEC Regulation Best Interest and state annuity best interest standards; and
- The Proposal tries to regulate, through new conditions in all future exemptions, the conduct of financial professionals and others the Department does not have the authority to regulate directly.

The Proposal attempts to predetermine the outcome of future exemptions needed to provide access to financial security rather than address each exemption on its own merits and in its own context. Given the Department's stated intention to modify current exemptions PTE 84-24 (needed for insurance and annuities) and PTE 2020-02 (needed for investment advice), it is inappropriate for the Department to address key issues in these future rulemakings through a procedural regulation Proposal.

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[1] https://consumerprotection.life/wp-content/uploads/2022/05/HBS-Study-Infographic-V21.pdf

[2] *See., Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

These substantive policy changes, such as standards of conduct for non-fiduciaries, must be considered on a case-by-case basis in the context of the facts and circumstances of each exemption, not as part of a "procedural" rule unrelated to any particular transaction. Accordingly, we offer our views regarding changes that must be incorporated into any final regulation.

The Proposal Predetermines Policies in Future Class Exemption Proposals that Would Affect Participants' Financial and Retirement Security:

The Proposal's effect of predetermining the outcome of the exemption process is especially worrisome in connection with class exemptions vital for financial and retirement security recommendations and assistance. The Department's guidance in the Preamble to PTE 2020-02 provides that many recommendations to rollover or transfer assets from an ERISA plan or IRA would be considered fiduciary advice for the purposes of ERISA and the Code.[3] To the extent such recommendations constitute fiduciary advice,[4] an exemption is needed to permit that advice to be provided to plan participants and IRA owners. PTE 2020-02 and PTE 84-24 are essential class exemptions permitting participants to receive such recommendations. The Department, however, has announced its intention to review both class exemptions and to modify their conditions and requirements.

While both exemptions address retirement security recommendations, they do so with different policies, requirements and conditions because they regulate different products and services provided in different markets. PTE 84-24 is specifically designed to address the state-based regulatory structure of annuity and insurance contracts, while PTE 2020-02 is based on the federal regulation of securities recommendations. PTE 2020-02, as a result, simply cannot be used by many insurance-licensed financial professionals—its policies, conditions and requirements do not fit the independent producer service model adopted by states as a consumer protection.

Finseca has addressed these concerns with PTE 2020-02 to the Department in correspondence and in comments. As the Department considers whether and how to modify these class exemptions, its decisions will have to be tailored to the very specific needs of participants and IRA owners in these very different regulatory environments. Those decisions must be individualized to each class exemption and rooted in the specific needs of the participants, products and services covered.

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[3] We note that the conclusions in this guidance are currently the subject of litigation challenging the Department's new interpretation of the underlying regulation adopted in 1975.

[4] Finseca's predecessor organization expressed our disagreement with the Department's conclusions in this guidance in comments and testimony regarding the PTE 2020-02 proposal (*See*., comment letter from Marc Cardin and Daniel LeBert dated August 6, 2020; and testimony by the Hon. Bradford Campbell on September 3, 2020; available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA29 last accessed on May 20, 2022.

The debate about standards of care and other conditions in revisions to a class exemption must occur in the context of the proposed amendment. It cannot and should not be an issue that the Department seeks to predetermine through a procedural rule that would apply to all class exemptions.

The Proposal Makes Policy Decisions, Not Just Process Updates:

Despite its original presentation as a procedural rule, the Proposal is not simply a logistical rule that modifies the mechanical processes by which ERISA plans and related parties apply for individual exemptions. If this were merely a procedural rule that explained where applicants should send which forms containing what facts, Finseca likely would not be offering comments on the Proposal at all.

Instead, we are compelled to offer comments precisely because the Proposal is being used as a vehicle to make substantive policy decisions, effectively attempting to "bake-in" requirements for all future exemptions that can and should only be decided on a case-by-case basis in the context of each exemption. The most significant of these policies is the attempt to impose a new "best-interest" standard of care (along with certain fee limits and disclosure requirements that the Department elsewhere calls the Impartial Conduct Standards) as the default policy position in all future exemptions.

Accordingly, we believe the rule is a "significant" rule under Executive Order 12866, and should be subject to Office of Management and Budget ("OMB") review, along with a complete economic analysis, including the impact on small businesses. EO 12886 Sec. 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." Finseca was one of sixteen organization who sent a letter to the Department on March 23, 2022 asking for an extended comment period, and a recognition that the Proposal is "significant." We appreciate that the Department extended the comment period, but it must also acknowledge the Proposal is "significant."

As we explain in more detail below, the Proposal raises novel legal and policy issues described in Sec. 3(f)(4).

- *Exemptions Are Necessary to Ensure Working Americans' Access to Financial Security*

Exemptions are not rare or unusual exceptions to the rules for esoteric issues. The Department has issued dozens of class exemptions and hundreds of individual exemptions—the reality is that exemptions are absolutely vital to ensure Americans' access to financial products and financial professionals that help working Americans achieve financial security. Without existing exemptions, millions of Americans would be denied access to insurance and annuity products and financial professionals who can assist them in making important choices. The reason is that many guaranteed income products essential to retirement security are recommended by financial professionals who are compensated through a commission or transaction-based method under state and federal law. Unfortunately, the very broad prohibited transaction rules in ERISA and the Code require an exemption to receive this common form of compensation.

We appreciate that the Department consistently has supported commissions and other transaction-based forms of compensation, but consideration of these issues must be done on a case-by-case basis—inserting major policy decisions related to compensation into a "procedural" rule will complicate the exemption process and potentially create conflicts that could have been avoided.

- *The Proposal's Expanded Scope Likely Exceeds the Department's Regulatory Authority*

The Department does not possess the authority to regulate the conduct of non-fiduciaries, or to compel them to meet a specific standard of care. Despite this, the Proposal would require all future exemptions to include as a condition that all parties (fiduciary or non-fiduciary) meet the new best interest, fee limitation and disclosure requirements known as the Impartial Conduct Standards.

Specifically, this "procedural" rule would redefine who these standards apply to, expanding them to include not just those "parties in interest" to the transaction (entities who have always been subject to an exemption's conditions), but also to anyone else "involved" in the transaction, including service providers hired to carry out various tasks. Explaining the unprecedented expansion of the scope of an exemption's conditions, the Department wrote, "The Department believes that parties engaged in the transaction (and their affiliates) that are not 'parties in interest' could have interests and potential conflicts that should be addressed by the Exemption Procedure Regulation. Similarly, the Department proposes to include service providers in the definition to ensure that all parties with interests in the transaction are included."[5]

We question the Department's assumption that it can use conditions in an exemption to establish conduct standards for persons it ordinarily cannot regulate. We note that the U.S. Fifth Circuit Court of Appeals vacated the 2016 Best Interest Contract Exemption ("BICE") in part because it sought to impose similar best interest conduct standards, fee limits and disclosure requirements as exemption conditions to financial service providers to IRAs over which DOL had no direct authority. In that case, the court wrote:

> "…the 'exemptions' actually subject most of these newly regulated actors and transactions to a raft of affirmative obligations. Among the new requirements, brokers and insurance salespeople assume obligations of loyalty and prudence only statutorily required of ERISA plan fiduciaries. Further, when brokers and insurance representatives use the BICE exemptions (as they must in order to preserve their commissions), they are required to expose themselves to potential liability beyond the tax penalties provided for in ERISA Title II…<u>The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable and arbitrary and capricious.</u> [emphasis added]"[6]

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[5] Preamble to the Proposal, 87 Fed. Reg. at 14,726 (March 15, 2022).

[6] *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 885 F.3d 360 at 382 and 384 (5th Cir. 2018).

- *The New Conduct Standards Do Not Comport with Existing Exemptions*

These new conduct standards are not consistent with the requirements of past exemptions, highlighting that their adoption should be considered on a case-by-case basis, within the context of a particular transaction. Only one current exemption— Prohibited Transaction Class Exemption 2020-02 ("PTE 2020-02")—contains these standards. Other class exemptions applicable to similar transactions do not. Seeking to apply these new standards to all future exemptions when the Department only recently adopted them, and then only in the context of a specific exemption addressing one issue, is arbitrary.[7]

- *The New Conduct Standards Conflict with Other Regulatory Standards, Requiring Individual Analysis, Not Blanket Adoption*

The new "best interest" standard of care would conflict with similar, but different "best interest" standards adopted by other regulators that could apply simultaneously to a transaction covered by an exemption. ERISA is unique in that it applies with respect to certain retirement plans and savings vehicles rather than to certain types of financial professionals. As a result, ERISA may apply simultaneously with the rules of another financial regulator, such as the Security and Exchange Commission ("SEC"), state insurance commissioners, state securities regulators, federal and state banking regulators, etc. For example, a representative of a broker-dealer must comply with the SEC's Regulation Best Interest. An insurance producer is likely to have to comply with the producer's state law or regulation adopting NAIC Model Rule #275, establishing a best interest standard for annuity recommendations.[8] Both of these "best interest" standards differ from the Department's specific "best interest" language in the Proposal. And as the Department specifically noted in the Preamble to PTE 2020-02, compliance with other regulatory standards will not ensure compliance with the Department's own "best interest" standard.[9]

Given the impact this regulatory "overlap" may have on retirement savers who must pay for duplicative compliance expenses, or who may be denied access to certain types of financial professionals (as the SEC determined occurred as a result of the Department's 2016 fiduciary regulation and associated exemptions),[10] this regulatory conflict must be addressed on a case-by-case basis in the context of the specific transaction at issue.

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[7] We note that these "best interest" standards were previously included in class exemptions adopted in 2016, but these exemptions were vacated by the 5th Circuit Court of Appeals in the *Chamber* case as arbitrary, capricious and inconsistent with statutory authority.

[8] Half of the states have adopted the NAIC Model Rule since its release in early 2020, and many more are likely to do so in the next 12 months.

[9] "The Department has not, however, offered a safe harbor based solely on compliance with regulatory conduct standards under federal or state securities laws… The additional conditions of the exemption provide important protections to Retirement Investors, who are…the subject of unique protections under Title I and the Code. The approach in the final exemption exemplifies the Department's important role in protecting Retirement Investors..." 85 Fed. Reg. 85,802 (December 18, 2020).

[10] "Our concerns about the ramifications for investor access, choice, and cost…are not theoretical. With the adoption of the now vacated Department of Labor ("DOL") Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher

Any Final Regulation Must Not Include New Standards or an Expanded Scope:

For the foregoing reasons, we urge the Department to:

1. Remove in its entirety Proposal §2570.34(b)(2) regarding the new standards of conduct, and

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2. Remove in its entirety the new definition of "party involved in the transaction" at Proposal §2570.31(l) and replace all references to that term with "party in interest" throughout any final rule.

Conclusion:

Working Americans and retirees must have access to financial products and professionals that will help them achieve financial security. Where those products and professionals require an exemption to serve their clients, the Department is obligated to consider each exemption on its own terms, based on the specific facts and circumstances applicable to the covered transaction. Attempting to insert universally applicable conduct standards in a procedural rule is contrary to this obligation. Attempting to expand the scope of exemption requirements to regulate entities the Department does not have the authority to regulate directly is also contrary to the Department's regulatory obligations. We urge the Department to adopt the changes we advocate in any final rule, and address issues like these in the proper forum—one exemption proposal at a time.

Sincerely,

Armstrong Robinson
Chief Advocacy Officer

priced in many circumstances…" Preamble to Final Regulation Best Interest, 84 Fed. Reg. 33,322 (July 12, 2019).