faegre drinker

faegredrinker.com

Bradford P. Campbell
Partner
bradford.campbell@faegredrinker.com
202-230-5159 direct

Faegre Drinker Biddle & Reath LLP
1500 K Street, NW, Suite 1100
Washington, DC 20005
+1 202 842 8800 main
+1 202 842 8465 fax

May 31, 2022

The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: RIN 1210-AC05, Docket ID Number EBSA-2022-003
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:

I am writing on behalf of several clients, who collectively work on the behalf of more than 500,000 participants and who are or who have been involved in seeking prohibited transaction exemptions from the Department in recent years. We appreciate the opportunity to comment on the proposed rule amending the 2011 Exemption Procedure Regulation[1] governing the prohibited transaction exemption process (the "Proposal").

Our clients normally would be unlikely to comment on an administrative rule, especially one originally identified by the Department as a procedural rule that is not "significant," and afforded only a 30-day comment period as a result. However, that is not what the Proposal is—it is, in fact, a "significant" rule within the meaning of Executive Order 12866, proposing substantive novel policy changes that would not only shape the outcome of future exemption determinations, but that would severely limit the ability of plans and other parties in interest to discuss, apply for and receive urgently needed exemptions that are in the best interest of participants and beneficiaries.

A wide array of groups representing ERISA plans, plan participants and plan service providers contacted the Department to express concern that the Proposal was a "significant" rulemaking requiring a 60 day comment period.[2] We appreciate that the Department recognized this reality,

[1] 29 C.F.R. §§2570.30-52, published 76 Fed. Reg. 66,637 (October 27, 2011).

[2] See, e.g., joint letter dated March 23, 2022 from 16 organizations requesting an extended 60 day comment period and classification of the Proposal as "significant" because it raises "novel legal and policy issues arising out of legal mandates…" under EO 12866 Sec. 3(f)(4).

and granted an extended comment period, writing in the Federal Register Notice that commenters needed time "…to develop and submit their comments regarding the proposed substantive changes to the current exemption procedure regulation…[emphasis added]."[3]

The policies embodied in the Proposal confirm and seek to codify some of the most troubling aspects of our clients' experiences in working with the Department on exemption issues in recent years. Rather than providing some predictability in the types of exemptions granted and the likely conditions the Department will require for similar transactions, the Proposal formally disavows all precedent. Rather than encouraging discussions with the Department on the types of issues and concerns that could lead to an application for an exemption, the Proposal formally discourages them. Rather than encouraging the use of experienced service providers and independent fiduciaries, the Proposal so severely restricts the eligibility of such persons that experience actually can be a disqualifying characteristic. Rather than governing the conduct of fiduciaries and parties in interest, the Proposal seeks to impose standards of conduct on service providers and others "involved" in the transaction over whom the Department has no regulatory authority.

As much as we are concerned by and disagree with many of the positions adopted in this Proposal, we do appreciate that this rulemaking has initiated a formal and public discussion of the regulated community's growing concerns about the future of the exemptions program. We offer our comments below.

A Robust Exemption Program is Vital to Protecting Participants, but the Proposal Would Dramatically Curtail Its Use:

The efficient use of the Department's authority under ERISA Sec. 408(a) to issue individual and class exemptions is essential to protect the best interests of plan participants and beneficiaries. ERISA cannot function as intended without an active and responsive exemption program administered by the Department—exemptions are needed for fundamental issues affecting all plans, such as hiring service providers or receiving investment advice, as well as esoteric and specialized transactions, such as transferring a single piece of in-kind property to a specific plan.

The prohibited transaction provisions in ERISA Sec. 406 and IRC Sec. 4975[4] are extremely broad, preventing plans from engaging in common transactions with a wide range of persons or entities close to the plan. While the intent of the prohibited transaction rules was to prohibit self-dealing, kickbacks, bribes, and other nefarious behavior by those in a position to take advantage of a plan and its participants, Congress also knew the effect of these rules was overly broad, not merely stopping bad actors, but also prohibiting many necessary and valuable products, benefits and services urgently needed by plans and participants. That's why Congress tempered the overly broad reach of the prohibited transaction rules by establishing exceptions to these broad rules: prohibited transaction exemptions under ERISA Sec. 408.

[3] 87 Fed. Reg. 21,600 (April 12, 2022).

[4] For simplicity, we will refer only to the ERISA citations for the remainder of this comment letter, given the parallel nature of the provisions in ERISA Sec. 406 and Code Sec. 4975, and the Department's authority to issue exemptions for both.

While immediately writing some exemptions into the law (statutory exemptions), Congress recognized that it could not anticipate all situations in which exemptions from these overly broad restrictions would be needed. As the conferees specifically noted in the Conference Report accompanying the final bill in 1974, "some transactions which are prohibited (and for which there are no statutory exemptions) nevertheless should be allowed."[5] Therefore, Congress gave the Department the essential authority to issue exemptions through an administrative process where doing so is in the best interest of the plan and participants.[6]

Until quite recently, the Department made regular use of this authority—in addition to dozens of class exemptions, it issued hundreds of individual exemptions. In fact, because many plans faced similar circumstances and needed similar exemptions, the Department established an expedited process under Prohibited Transaction Class Exemption 96-62 ("EXPRO") to permit rapid review of exemption applications that were "substantially similar" to two other exemptions granted within the past five years.[7] Through EXPRO, both plans and the Department could apply established answers to parallel situations, better and more efficiently serving the needs of plan participants.

The Department took these steps because it recognized that participants benefit from exemptions. The Department also historically recognized that the exemption process was necessary, and not a source of dangerous enforcement loopholes or risks. Put simply, a plan or party in interest that:

1. willingly approaches EBSA (a Federal regulatory and enforcement agency staffed by some of the most specialized and experienced ERISA attorneys in the country and possessing broad investigative powers);
2. invites EBSA to review their current and proposed activities, knowing this may trigger an investigation of the plan; and
3. invests significant time and effort into making the exemption request, knowing that EBSA can refuse at its own discretion, or approve only after imposing significant conditions through a public notice and comment process;

is doing so because the fiduciaries involved believe it is good for the plan and the participants, not because they think they can convince the Department unwittingly to authorize improper behavior.

To our knowledge, there have been no enforcement cases in which the Department found that a plan or party in interest receiving an exemption abused or exploited the exemption to harm participants. The Department certainly provides no examples of such misconduct in its discussion of the rationale for the Proposal's significant new limitations on the types of

---

[5] Conference Report 93-1280, Accompanying H.R. 2, the Employee Retirement Income Security Act, at 309. (August 12, 1974).

[6] We note that the original exemption authority was vested jointly in the Secretaries of Treasury and Labor and later consolidated under the Secretary of Labor.

[7] 67 Fed. Reg. 44,622 (July 3, 2002).

exemptions it will consider, or the types and conduct of service providers who may be involved in the transaction.

We are very concerned that the Department in recent years appears to be significantly curtailing the exemption program, culminating in the formal restrictions of the Proposal. The number of exemptions granted has been reduced from dozens per year to a trickle. As indicated in recent press reports, in the five-year period from 1997 to 2001, the Department issued an average of 90 exemptions per year, but from 2016-2021, it granted fewer than 10 exemptions per year.[8] So far this year, the Department has granted only 2 exemptions. No EXPRO exemptions at all have been granted since 2020, and only one in that year. In fact, the Department has refused to honor the EXPRO process, indicating to some of our clients that they should not apply using EXPRO as such applications will not be considered.

The Proposal Inappropriately Limits Discussions with DOL Officials:

The prohibited transaction rules are very complex. It is not always clear whether a prohibited transaction exists, and the process for applying and receiving an exemption is lengthy, often taking years. As a result, for decades interested parties have engaged in informal discussions with the Department regarding whether a prohibited transaction exists based on certain facts, and if so, whether the Department would consider an exemption to address the issue. These informal discussions are typically anonymous, permitting the Department and the potential applicant to have a useful discussion of the basic issues before the applicant commits to the significant time and expense of applying, and before the Department must commit time and resources to formally opening a file and reviewing an application. The entities approaching the Department have always understood that these informal discussions do not constitute official policy statements on which parties can assert legal reliance.

The Proposal would effectively ban these informal and anonymous communications, to the detriment of plans and the Department. Under §2570.33(d) of the Proposal, the Department "will not engage a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not…[i]dentify and fully describe the exemption transaction [and] [i]dentify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction." Under §2570.31(k), the Department defines a pre-submission applicant as a "…party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable."

The Department explains that its has adopted this provision "…to address a recurring problem faced by the Department when a pre-submission applicant seeks informal guidance from the Department while disclosing an incomplete set of facts and later bases its arguments for an exemption on the Department's informal guidance received before the submission."[9]

---

[8] "DOL adds comment time for exemption application proposal," by Bryan Croce, Pensions&Investments.com, April 8, 2022.

[9] 87 Fed. Reg. 14,727, (March 15, 2022).

We respectfully disagree that this solution reasonably addresses that narrow "problem." If the Department eliminates any discussion of a fact pattern without identifying the specific parties, parties must either publicly announce their interest in exploring an exemption (only to have a conversation that may convince them not to apply), or forego the potential benefits to participants and never approach the Department at all.

This choice is not in the best interest of participants and beneficiaries. The Proposal ignores the reality that being forced to publicly indicate interest in a potential exemption—just to explore whether such an exemption is even feasible—could have significant negative repercussions for the plans and participants involved. For example, early public disclosure of a contemplated transaction that may need an exemption could negatively affect a plan's financial interests. The Proposal also ignores the lost opportunity costs in which a plan might benefit from an exemption, but the risks and costs of publicly discussing the matter as part of its evaluation convince the plan sponsor simply to discard the concept. We, of course, agree that the process of applying for an exemption should be a matter of public record, but merely discussing a fact pattern with the Department cannot and should not be.

We also disagree that the issue the Department identifies is truly a problem. The Department has always made it clear to parties having an informal discussion that they cannot rely on the informal guidance, and that a full examination of all the facts may yield a different result. This is especially evident where, as the Department alleges is the case here, the informal summary omits material information. We do not agree that it is a difficult burden for the Department to tell an applicant that its failure to disclose material facts negatively affects the Department's formal analysis. We also do not agree that the decision to refuse to engage in such conversations at all is a solution reasonably tailored to the "problem" of having to refuse an applicant that omitted key facts.

Finally, adopting a regulation that refuses to speak with the regulated community on an anonymous basis—even informally—is inconsistent with the common practices of the Department and its fellow regulators, such as the IRS, SEC and others.[10] Even the regulatory process requires the Department to consider anonymous comments it receives in response to proposed regulations.

Eliminating the possibility of anonymous discussions will significantly limit useful informal discussions that serve all parties well before significant time and resources of the government or the applicant are wasted. We urge the Department to remove these provisions in any final regulation.

<u>Officially Disavowing the Role of Precedence in the Regulatory Process is Improper:</u>

A bedrock principal of administrative law is the reasonable and consistent application of policies to similar facts. An agency cannot reasonably conclude that person A and person B—both of whom have essentially the same set of circumstances—will be treated differently. To do so is

[10] See, e.g., Rev. Proc. 2021-30 (EPCRS) §10.1, "…a representative of a Plan Sponsor may request an anonymous VCP pre-submission conference regarding corrective actions with respect to any failure that is eligible to be submitted under VCP."

arbitrary and capricious.[11] Consistent and predicable law-making is an essential feature of our society.

We agree, of course, that precedent does not prevent an agency from changing policies through the appropriate regulatory process. If the Department determines that some new conditions are necessary in commonly requested exemptions, it certainly has the authority to address this through the exemption process. However, the Department cannot take the official position that recent administrative decisions in exemptions are wholly irrelevant and can be willfully ignored by the Department to achieve different outcomes for similarly situated applicants. This is a reservation of right for arbitrary and capricious administrative procedure, not mere notice that policy decisions may evolve over time.

Given that an individual exemption is only available to the parties to whom it is granted, the Department also has an obligation to provide similar exemptions to similar applicants to ensure a level playing field. If the Department is not consistent as between two similar exemption requests by competing plan sponsors, it favors one market participant over another, providing a competitive advantage.

In §2570.30(g), the Department states:

"The Department's issuance of an administrative exemption is at its sole discretion based on the statutory criteria…The existence of previously issued administrative exemptions is not determinative of whether future exemption applications with the same or similar facts will be proposed, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemption [emphasis added]."

Explaining this clause in the Preamble, the Department wrote:

"The addition of this language reinforces that Department's existing policy that it has the sole discretionary authority to issue exemptions and is not bound by facts or conditions of prior exemptions in making determinations with respect to an exemption application. This policy allows the Department to retain sufficient flexibility to grant exemptions that are appropriate in an ever-changing business, legislative, and regulatory policy environment.[emphasis added]"[12]

Unfortunately, this Preamble statement is simply not correct. That is not the Department's existing policy, as the current exemption procedures regulation adopted in 2011 contains no such language. The Department's official policy is codified in the EXPRO process established by PTE 96-62, which is a regulation of general applicability adopted by the Department through notice and comment rulemaking in 1996. It is used frequently by the Department to issue exemptions based on precedent, most recently in 2020.

[11] See, e.g., Westar Energy, Inc. v. Federal Energy Regulatory Commission, 473 F.3d 1239, 1241 (D.C. Cir. 2007), "A fundamental norm of administrative procedures requires an agency to treat like cases alike."

[12] 87 Fed. Reg. at 14,724.

EXPRO is based on precedent. In fact, it has a presumption of approval by the Department based primarily on precedent. If the requested exemption is substantially similar to two prior exemptions granted in recent years, [13] PTE 96-62 Sec. IV(c) provides "tentative authorization" within 45 days of receipt of the application unless the Department affirmatively denies it. With tentative authorization, the applicant my begin giving notice to interested parties, and the comment period begins. Under Sec. IV(d), "final authorization" is presumed five days after the end of the comment period, unless the Department denies the exemption or there are substantive adverse comments to resolve. In other words, because it is mirroring recent precedent, an EXPRO application is presumed approved unless the Department affirmatively states otherwise.

We note that the Department does not address the EXPRO class exemption anywhere in the Proposal. This concerns us, because it is not clear whether the Department intends by the Proposal to effectively eliminate the EXPRO exemption, or whether it remains available.

We urge the Department to remove this provision in any final regulation, and revert to the current language of the existing procedure.

The Proposal's Overly Broad Investigation Restriction Inappropriately Limits Applicants:

In describing applications the Department ordinarily will not consider, the Proposal goes significantly too far with regard to excluding transactions or parties that are under investigation by (or are a defendant in an action brought by), the Department, the IRS and "any other agency enforcing…any other Federal or state laws."[14] We appreciate that the Department does not want the exemption process to be used by what it terms "bad actors,"[15] but this restriction is so broad as to include nearly any major plan sponsor in the United States at any given time, and is in no way related to reasonably identifying "bad actors." It is hard to understand why a single state's investigation into compliance with environmental regulations, or manufacturing facility conditions, or advertising claims would be relevant—much less a barrier—to the Department's consideration of an exemption related to that company's pension plan.

Further, as the Department knows from its own civil investigation program, being the subject of an investigation has nothing to do with whether an entity is a bad actor. As the GAO reported in its analysis of EBSA's own enforcement program, being selected for investigation by EBSA itself may not even be tied to any specific suspicion of wrongdoing, but may be part of a random

---

[13] With regard to the Department's argument that precedent must be waived to preserve the Department's ability to respond to an "ever-changing business, legislative, and regulatory policy environment," we note that the Department addressed this same concern in EXPRO by limiting the period for substantially similar exemptions to the past 60 months. As the Department wrote in adopting that standard, "The Department notes that the 60-month requirement was developed to ensure that the two substantially similar individual exemptions that the party compares to its proposed transaction reflect the current exemption policies of the Department." 61 Fed. Reg. 39,989 (July 31, 1996).

[14] Id., at 14,727.

[15] Id.

survey of plans.[16] Further, even when investigations are targeted, a significant number of EBSA's civil investigations are closed with no violations, monetary results or corrective actions of any kind.[17] And even where violations are found, the GAO reported that EBSA "determined that violations identified in the study included what the agency characterized as minor reporting or paper violations with little impact on plan participants…"[18] Thus, even when EBSA itself is directly investigating plans and service providers for ERISA violations, the fact that an investigation is ongoing does not demonstrate that the target is a "bad actor."

Expanding the scope of the restriction in the current exemption procedures to exclude entities under investigation related to any Federal or state law by any Federal or state agency is unreasonable and may, as a practical matter, bar a substantial number of applicants. Despite the Department's assertion that it "…must be completely free from doubt regarding the transaction and the motivations of the parties involved in order to make its findings under ERISA section 408(a),[emphasis added]"[19] we do not perceive there to be any basis under ERISA Sec. 408(a) for baring consideration of an exemption for reasons entirely unrelated to an employee benefit plan. Some industries are under routine review as part of their regulatory oversight structure, including transportation, medical, pharmaceutical, insurance and other financial services. Arbitrarily finding these to be in a category of parties whom the Department will ordinarily refuse exemptions is contrary to the best interest of participants working in those industries.

Finally, the Proposal is fatally vague as to what "investigation" means in the context of the enforcement of literally thousands of Federal and state laws and regulations that use different terminology—how does an investigation differ from an audit, an exam, an inspection, a review or a dozen other terms that might apply? Is the inspection of a food manufacturing facility by a health and safety inspector an "investigation" for this purpose? What about an exam by a securities or a banking regulator?

For all of these reasons, we urge the Department to remove provisions that would expand the current exemption procedure regulation, limiting application by entities involved in investigations and actions under statutes or regulations that are unrelated to ERISA.

---

[16] See, e.g., ("…EBSA selected a random sample of…plans for investigation annually, tracked the progress of the investigations, and analyzed the results...[EBSA] found that about 60 percent of all the plans sampled each year failed to comply with some aspect of ERISA. [emphasis added]"), "GAO Report 21-376 Employee Benefits Security Administration: Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans," pgs 24-25, May 2021.

[17] See, e.g., ("In FY 2021, EBSA closed 1,072 civil investigations with 741 of those cases (69%) resulting in monetary results for plans or other corrective action."), "Fact Sheet: EBSA Restores Over $2.4 Billion to Employee Benefit Plans, Participants and Beneficiaries," https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf, accessed on May 26, 2022.

[18] GAO Report at 25.

[19] 87 Fed. Reg. at 14,727.

The Proposal Would Severely Limit Availability of Experienced Independent Fiduciaries:

The use of independent fiduciaries is one of the most common and important conditions of exemptions. We are very concerned that the very broad eligibility restrictions on independent fiduciaries will substantially increase costs and reduce access to experienced independent fiduciaries. Unfortunately, in its economic analysis, the Department made no effort to determine how these restrictions would affect the cost and availability of such services. We believe the effect would be substantial, and would cause harm to participants and beneficiaries.

The current definition states that an independent fiduciary must receive less than five percent of its annual revenues from any party in interest to the transaction, and is presumed independent at less than 2%. The Proposal replaces this with a significantly narrowed threshold and vague standards of potential conflicts. Specifically, §2570.31(j) would define independent fiduciary to be:

> "…is any individual or entity with appropriate training, experience, and facilities…that is independent of and unrelated to: Any party involved in the exemption transaction (as defined in paragraph (l) of this section) and any other party involved in the development of the exemption request. In general, the determination as to the independence of a fiduciary will be made by the Department on the basis of all relevant facts and circumstances. Among other things, the Department will consider whether the fiduciary has an interest in the subject transaction or future transactions of the same nature or type.. A fiduciary will not be treated as independent if the revenues it receives…from parties (and their affiliates) involved in the exemption transaction are more than two percent…unless, in its sole discretion, the Department determines otherwise. [emphasis added]"

This new definition would significantly reduce the number of eligible independent fiduciaries due to the interaction of these new requirements. Taken together, we believe they will prevent the most qualified independent fiduciaries from serving plans, undermining the Department's purpose.

First, and most troubling, the Department would make experience a barrier to service. If a potential independent fiduciary is well-experienced in evaluating a certain type of transaction, the new definition finds this to be a potentially disqualifying "business interest" that "motivated [the fiduciary] to use the exemption transaction to promote its fiduciary services to potential clients contemplating similar transactions…"[20] In other words, the more experience an independent fiduciary has in a particular type of transaction, the more likely the Department is to view that entity as conflicted, despite the fact that it is best able to fulfill its role precisely because of its familiarity with the complexities of the transaction.

This incredibly narrow view of fiduciary independence is incompatible with nearly every other fiduciary norm. ERISA does not prohibit a fiduciary from being paid to provide services—all professional fiduciaries hired by plans are marketing their professional services. This does not affect their legal obligations to serve solely in the interest of the participants and beneficiaries of

[20] Id. At 14,726.

the plan. In fact, in any other context, hiring a professional trustee with extensive experience in the subject matter at issue would be the gold standard of prudence. We question whether the Department ordinarily would look favorably on a service provider selection process that passed over many more experienced candidates and affirmatively chose an entity with the minimum qualifications expressly because it had the least experience and therefore the fewest potential conflicts.

Second, by further lowering the revenue threshold, the Department would require the independent fiduciary to be part of a large organization. The result is that eminently qualified persons of unimpeachable character are excluded from consideration simply because they operate a small business. Not only does this reduce the pool of eligible fiduciaries substantially and discriminate against small businesses, but it also introduces significant monitoring concerns related to ongoing transactions. Independent fiduciaries that are near the threshold must ensure they meet the threshold annually, and could fail to do so in the middle of an ongoing transaction for unrelated reasons (illness or retirement of a partner, loss of an unrelated client, etc.).

Third, the independent fiduciary would not only have to be unrelated to the parties in interest in the transaction, as in the current rule, but to all parties "involved" in the transaction, including any party involved in developing the request or preparing the application. It is not clear exactly how broad the scope of the prohibition would be in practice. Would an independent fiduciary that is part of a large organization be disqualified from serving because another part of that large organization separately provided actuarial services to a consultant who assisted in drafting the exemption application?

Taken as a whole, these requirements severely limit the pool of qualified independent fiduciaries with a web of contradictory standards. An independent fiduciary must be well-qualified and able to understand and protect the interest of participants in a potentially very complex transaction…but must also be inexperienced enough to not be able to market its independent fiduciary services in connection with any particular type of transaction. The independent fiduciary must be large enough for its fee to be less than 2% of annual revenues…but must also be small enough that none of its related entities work with law firms or consultants that advise applicants on prohibited transactions.

We urge the Department to retain the current definition and not adopt the changes in the Proposal. If the Department does modify the definition in some way, we believe a full economic analysis of the effect of such modification on the pool of eligible independent fiduciaries is essential. This should include an analysis on the effect on small businesses.

<u>The Proposal Attempts Conduct Regulation Beyond the Department's Authority:</u>

The Proposal seeks to require that all future exemptions include the Impartial Conduct Standards, and to apply these conduct standards to entities over whom the Department has no regulatory authority. Specifically, the Proposal applies the new conduct standards not only to parties in interest to the transaction, but also to anyone else "involved" in the transaction, including non-fiduciary service providers hired to carry out various tasks. Both the attempt to impose these

conditions in a procedural rule, and the attempt to govern the conduct of entities the Department does not have the authority to regulate directly, are improper.

First, decisions about which conditions should be included in an exemption must be individualized and considered in the context of the exemption, not applied arbitrarily as a new condition for all future exemptions. Including these standards in the rule intended to govern the process is an effort to predetermine the outcome of future exemptions, and should no more be part of this "procedural" rule than a requirement that all transactions use an independent fiduciary, or that all transactions must consider ESG factors. If the Department wishes to include a new standard of care, it should do so on a case-by-case basis.

Second, the Department has no authority to directly regulate the conduct of non-fiduciary service providers to the exempted transaction. The Department's explanation 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…includ[ing] service providers…"[21] does not confer on it the authority to regulate entities over whom it has no jurisdiction.

Further, the Proposal seeks to impose these new conduct standards on many service providers that already have a code of conduct and a professional body governing their behavior. Lawyers, actuaries and accountants, for example, have codes of conduct—imposing a new and potentially conflicting standard that duplicates or disagrees with existing professional codes of conduct is confusing and wasteful.

The Department appears to believe that exemption conditions are different, and that it can impose exemption conditions governing the conduct of non-fiduciaries it cannot otherwise regulate. We do not believe this view is consistent with recent court rulings.

The U.S. Fifth Circuit Court of Appeals vacated the 2016 Best Interest Contract Exemption in part because it sought to impose the Impartial Conduct Standards on financial service providers to IRAs. Noting that DOL had no direct authority to regulate the conduct of advisors to IRAs, 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…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."[22]

Therefore, we urge the Department remove §2570.34(b)(2) regarding the new standards of conduct; to remove the new definition of "party involved in the transaction" at §2570.31(l); and to replace all references to "party involved" with "party in interest" throughout any final rule.

---

[21] Id.

[22] *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).

Conclusion:

Our clients are very concerned that the Proposal would significantly reduce the ability of plans and participants to benefit from prohibited transaction exemptions. Congress provided the authority for the Department to issue exemptions precisely because the prohibited transaction rules are so broad, and it intended the Department to use this authority. Unfortunately, the Proposal would do the opposite, severely restricting the availability of exemptions.

The Proposal is not a procedural rule—it is a substantive set of policy-making decisions that constitute a "significant" rule under Executive Order 12866. Proposed without the necessary economic analysis to assess its impact on plans, participants and small businesses, the Proposal would have a material and negative effect on plans and participants. Rather than making substantive policy decisions in the proper context, based on the specific facts and circumstances of each exemption as ERISA Sec. 408(a) requires, the Proposal seeks to impose blanket change affecting all future exemptions, attempting to make policy in the name of process. From radically limiting who may apply, to disqualifying experienced independent fiduciaries, to imposing new conduct standards on entities the Department ordinarily cannot regulate, the Proposal raises serious concerns the Department must address if it is to protect the participants it exists to serve.

Thank you for the opportunity to present our comments.

Sincerely,

Bradford P. Campbell