

James Szostek  
Vice President and Deputy, Retirement Security  
(202) 624-2378  
jimszostek@acli.com

Howard Bard  
Vice President and Chief Counsel, Employee Benefits  
(202) 624-2028  
howardbard@acli.com

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U.S. Department of Labor  
Employee Benefits Security Administration  
Office of Exemption Determinations  
200 Constitution Ave. NW,  
Washington, DC 20210

**Subject: RIN 1210-ACO5 - Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications**

Greetings:

On behalf of the American Council of Life Insurers (ACLI), we offer these comments in response to the Notice of Proposed Rulemaking (“Proposal”) issued by the Department of Labor (“Department”). This Proposal 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>1</sup> Our comments are limited to the proposed revisions to 29 C.F.R §2570.34 which would incorporate “impartial conduct standards” as formalized in Prohibited Transaction Exemption 2020-02 as a baseline condition for approved exemptions. As discussed further below, this requirement raises a novel legal issue, is inconsistent with current law and is outside the scope of the Department’s rulemaking authority.

The Proposal is Inconsistent with Current Law

The Proposal would be applicable for prohibited transaction exemptions sought for both plans subject to ERISA as well as individual retirement arrangements and other plans not subject to ERISA. Section 2570.34(b)(2)(1)(A) of the Proposal requires a statement that the transaction will

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American Council of Life Insurers | 101 Constitution Ave, NW, Suite 700 | Washington, DC 20001-2133

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The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI’s member companies are dedicated to protecting consumers’ financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI’s 280 member companies represent 94 percent of industry assets in the United States.

be in the best interest of the plan and its participants and beneficiaries or an explanation as to why this should not be applicable to the transaction.

Section 2570.34(b)(2)(iii) describes circumstances under which exemption transaction will be seen to be in the “best interest” of the plan and its participants, restates the key elements of ERISA Section 404(a)(1), and requires 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.” According to the Department, this section “generally incorporates compliance with impartial conduct standards as formalized in Prohibited Transaction Exemption 2020-02 as a baseline condition for approved exemptions.”

The inclusion of PTE 2020-02’s “subordination of interest” requirement and impartial conduct standards represents a substantive change to the Department’s exemption application requirements and the Department provides no rationale or basis for inclusion of this additional requirement. We question both the need for this provision and the Department’s ability to engage in rulemaking that would impose PTE 2020-02’s impartial conduct standards on transactions involving non-ERISA assets.

For transactions involving ERISA plan assets, we do not understand why the Department seeks to have fiduciaries affirm a commitment to abide by their obligations under ERISA. A fiduciary who is subject to the obligations under ERISA section 404(a) and who then seeks exemptive relief should be assumed to have a working knowledge of their duties under ERISA to the ERISA plan and its participants. Further, we cannot conceive of a reason why the Department’s proposal would provide these fiduciaries with an opportunity to explain why these obligations under ERISA should not apply, as if the Department had authority to waive these obligations.

For transactions involving non-ERISA plan assets, the Department’s proposal to apply PTE 2020-02’s impartial conduct standards to non-ERISA assets is inconsistent with the Fifth Circuit Court of Appeal’s holding in *U.S. Chamber of Commerce v. DOL*, which struck down the Department’s 2016 fiduciary rulemaking’s attempted imposition of the 2016 Best Interest Contract Exemption’s Impartial Conduct Standards on non-ERISA transactions. In its holding striking down the 2016 rulemaking package, the Fifth Circuit found that

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.<sup>ii</sup>

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. The “baseline” requirement that all exemption applications, including applications for ERISA plans and non-ERISA plans, include impartial conduct standards, is clearly outside the scope of the Department’s regulatory jurisdiction. The Department should strike Sections 2570.34(b)(2)(1)(A) and 2570.34(b)(2)(iii) of the Proposal and must not impose the duties of ERISA Section 404(a)(1) to non-ERISA transactions.

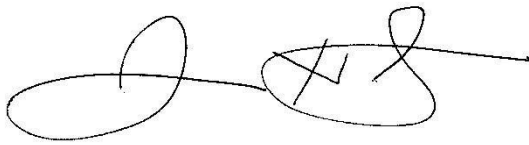
The Proposal is a Significant Regulatory Action and Accordingly Requires OMB Review

The substantive issue highlighted above raises a novel legal and policy issue. Accordingly, the Proposal should be treated as a “significant” regulatory action under Executive Order 12866 and should be reviewed by the Office of Management and Budget. We therefore request that the Department evaluate whether the Proposal should be withdrawn and submitted to OMB for review prior to reissuance.

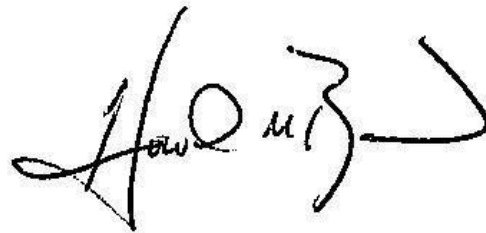
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On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department.

Respectfully,



James H. Szostek



Howard M. Bard

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<sup>i</sup> 87 Fed. Reg. 14722 (March 15, 2022).

<sup>ii</sup> See Chamber of Commerce of the United States v. Acosta, 885 F.3d 360, 384 (5<sup>th</sup> Cir. 2018).