



May 27, 2022

Submitted electronically

The Honorable Ali Khawar
Acting Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Procedures Governing the Filing and Processing of PTE Applications (RIN 1210-AC05)

We write to provide comments with respect to the Department of Labor’s proposed rulemaking related to the “Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications” (the “Proposed Rule”). 87 Fed. Reg. 14722 (March 15, 2022). As discussed below, we view individual and statutory prohibited transaction exemptions (“PTEs”) as critical for the efficient operation of employee benefit plans.

Consequently, we are very concerned by the Department’s formal and informal changes to the application process over the past decade and the resulting chilling effect the changes have had on the process for prudent fiduciaries to seek appropriate exemptive relief.¹ We are very concerned that the Proposed Rule would exacerbate this concerning trend by creating unnecessary and inappropriate barriers for prudent fiduciaries seeking exemptive relief.

CIEBA Background – Experienced Investment Fiduciaries. CIEBA represents 113 of the country’s largest pension funds and defined contribution plans. Our Members manage more than \$2 trillion of defined benefit and defined contribution assets on behalf of more than 17 million plan participants and beneficiaries. CIEBA represents the interests of chief investment officer fiduciaries, virtually all of whom have decades of experience in serving as investment fiduciaries for many of the largest and most sophisticated private retirement savings pension and 401(k) plans in the United States. Since 1985, CIEBA has provided a nationally recognized forum and voice for corporate plan fiduciaries on investment and fiduciary issues.

¹ According to a Bloomberg Law analysis of DOL’s own statistics cited in a recent article: “The number of prohibited transaction exemptions the [DOL] issues each year has declined by more than 97% since 2002 — from 77 individual and expedited exemptions granted in 2002 to just three approved last year, and two granted in 2020.” BNA Daily Labor Report, April 21, 2022, by Austin R. Ramsey.

Prohibited Transaction Exemptions and the purpose of preventing business disruption while providing safeguards. As the Department is aware, the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the Internal Revenue Code of 1986, as amended (the “Code”), include extremely broad prohibitions on self-dealing and conflicted transactions. The prohibitions are so broad on their face that they would make the day-to-day management and administration of pension plans all but impossible.

Fully recognizing this, Congress created a series of statutory PTEs and provided the Department with authority to grant additional individual and class exemptions. Congress explained that the purpose of providing the Department with this authority was to prevent disruption of “established business practices, subject to adequate safeguards to protect employee benefit plans.” H.R.Conf.Rep. No. 1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 5038, 5089–90.

From time to time, prudent fiduciaries and their business partners need to work with the Department to facilitate transactions beneficial to employee benefit plans that would otherwise be prohibited by the purposefully broad proscriptions of ERISA and the Code. The Department has a long history of working collaboratively with prudent plan fiduciaries to issue PTEs addressing pension funding challenges or creating more efficient investment structures, among other things. This need for a collaborative approach between the Department and the sponsor community remains just as important today as it was when ERISA passed in 1974.

However, over the years, the Department has made it more and more costly and burdensome to apply for a PTE. Consequently, the Department has received fewer and fewer applications, and the number of PTEs granted annually has fallen drastically. This has led to a growing and now pervasive view in the plan sponsor community that the Department is simply unwilling issue PTEs in all but the most narrow circumstances, regardless of the potential benefits to plans and participants. Unfortunately, the Proposed Rule reinforces this view by making it more difficult to apply for a PTE and discouraging open communication between the agency and potential applicants.

The Department’s proposed changes should encourage use of the Exemption Process, rather than discourage it. In particular, we are concerned that the Proposed Rule is overly prescriptive. For example, we see no reason to codify hard-and-fast rules related to independent fiduciaries and appraisers, particularly given that the Department has not analyzed the impact such requirements will have on the availability of qualified experts. Similarly, we see no reason to create a prohibition on plans bearing costs associated with a PTE. There are unquestionably instances in which a PTE is in the best interest of a plan even if the plan has to pay some or all of the costs (*e.g.*, the fees for an independent appraiser). Rather than adding new hurdles to the PTE application process, we encourage the Department to eliminate existing barriers and rules that make it difficult to obtain an exemption.

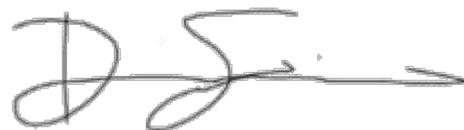
We also urge the Department to reconsider portions of the Proposed Rule that would subject sensitive and confidential business information to public inspection. Although CIEBA supports a transparent and fair process, we feel strongly that communications between the Department and stakeholders preceding a formal application should not be included as part of the application and the public record. Doing so would have a chilling effect and unnecessarily discourage exemption

applications. Making public any requests for guidance on whether a new PTE is needed would also discourage efforts to comply with the prohibited transaction rules in general.

Finally, we ask that the Department consider improvements to the PTE application process that will expedite the approval of applications, particularly in the case of time sensitive transactions. In our experience, prudent fiduciaries may have to wait for months or even years while the Department considers an application for what often appear to be relatively mundane and routine transactions. The Department previously attempted to address this issue through the EXPRO program, but the Department now grants so few PTEs that the EXPRO program has been *de facto* terminated. We certainly recognize the need for a deliberative PTE application process but granting PTEs should be far more routine and efficient than it is now.

We greatly appreciate the Department's consideration of our views, and we would be happy to discuss the issues further.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Simmons", with a long horizontal flourish extending to the right.

Dennis Simmons
Executive Director