



MICHAEL D. SCOTT
EXECUTIVE DIRECTOR
E-MAIL: MSCOTT@NCCMP.ORG

May 31, 2022

Mr. Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Submitted electronically via www.regulations.gov

Re: Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications (RIN 1210-AC05)

Dear Acting Assistant Secretary Khawar:

The National Coordinating Committee for Multiemployer Plans (“NCCMP”) appreciates this opportunity to comment on the Employee Benefits Security Administration (“EBSA”), U.S. Department of Labor’s (“the Department” or “DOL”) Notice of Proposed Rulemaking: *Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications*, published at 87 Fed. Reg. 14722 (March 15, 2022)¹ (the “Proposal” or “NPRM”). The Proposal would significantly modify the rules applicable to the filing of prohibited transaction exemptions under Section 408(b) of the Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”), 29 U.S.C. § 1108(b).

The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans, as well as the unions and the job-creating employers of America that sponsor them, and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America’s working men and women.

¹ In response to multiple requests from interested parties for additional time to develop and submit comments on the proposal, EBSA extended the comment period for an additional 45 days (see 87 Fed. Reg. 21600 (April 12, 2022)). Although the published notice specifies that the comment period closes on May 29, 2022, we have confirmed with the Department that, because the 45-day period ends on a Sunday, pursuant to 1 C.F.R. § 18.17, the comment period does not close until May 31, 2022, which is the next-following business day.

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The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. These industries include airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking/transportation. Multiemployer plans are jointly trusted by labor and management trustees.

Summary of Comments

The NCCMP generally agrees with the Department's efforts to clarify and streamline the procedures for obtaining prohibited transaction exemptions ("PTEs"). We are concerned, however, that the NPRM raises hurdles to the process that are both unnecessary and counterproductive. Furthermore, the nature of multiemployer plans is that they tend to have significantly more complicated relationships with their stakeholders and other parties in interest than other types of plans. Because of these relationships, multiemployer plans are more likely to require the relief provided by PTEs in order to best serve the needs of the plans' participants and beneficiaries.

As the Department is aware, multiemployer plans are collectively bargained, and are most typically organized as so-called "Taft Hartley Plans", organized pursuant to the requirements of Section 302(c)(5)-(8) of the Labor Management Relations Act of 1947, *as amended*, 29 U.S.C. § 186(c)(5)-(8). Multiemployer plans always involve more than one employer and at least one union. Section 3(37)(A) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1001(37)(A). Furthermore, Taft Hartley Plans are administered by joint boards of trustees composed of equal numbers of employee (union) and employer representatives, and possibly one or more neutral Trustees. In practice, multiemployer plans may cover dozens, or even hundreds, of employers. This means that the number of "parties in interest" can be very numerous.

One other distinguishing characteristic of multiemployer plans is that they are fundamentally separate entities from their stakeholders. Unlike single employer plans, which are often provided office space and personnel directly from the employer, multiemployer plans are not under the domain of a single employer or union. Instead, they must seek their own office space, hire their own personnel, negotiate their own contractor agreements, *etc.* Often, they even own the facilities out of which the plans are administered, and lease out extra space to third parties, including parties in interest. This fundamental difference was recognized by the Department early on when it issued PTEs 76-1 and 77-10. These crucial PTEs lay the basic ground rules for shared services and office space involving multiemployer plans. PTE 76-1 also deals with another issue that is generally unique to multiemployer plans – the issue of employer delinquencies. This is an acknowledgement

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that multiemployer plans often have numerous contributing employers, not all of which always pay their contributions timely.

Furthermore, there are numerous individual PTEs involving multiple issues. For example, there are a number of PTEs involving a plan's purchase of real property from one of the employers or unions that maintain the plan. *See, e.g.*, PTEs 2015-19, 2018-4. It is for these reasons that, should the NRPM be adopted in its current form, its ineluctable effect of reducing the ability of plans to apply for and obtain PTEs is problematic. Some of the specific areas of concern are described below.

Discussion of Specific Provisions

Elimination of Informal Pre-Application Conferences

One of the most useful parts of the existing PTE submission process is the ability to engage in informal, anonymous conferences with the Department. These conversations are helpful and make the process more efficient for both the Department and potential applicants. Proposed 29 C.F.R. § 2570.33(d) would effectively prohibit these types of discussions.

In the first instance, these informal discussions act as a type of gatekeeper, where a potential applicant can get a reality check to determine whether a contemplated PTE is even feasible. Having the opportunity to get such a reality check permits potential applicants the opportunity to explore alternative courses of action before too much time, effort, and expense are wasted in what is likely to turn out to be a fruitless endeavor. In addition to discouraging people from engaging in a futile effort, which would also waste the time and resources of the Department, these conversations can also inform potential applicants at the earliest opportunity that they may need to build additional protections and safeguards into a contemplated transaction in order to address the Department's concerns before the application is even filed. Again, this works for the benefit of both the applicant and the Department.

The reason proffered for this fundamental change in the procedures is that applicants may provide an incomplete set of facts, receive an informal opinion from Department personnel based upon faulty premises, and then use that informal opinion as a basis for its argument for an exemption. Eliminating these conferences in order to prevent these types of misunderstandings is truly throwing the baby out with the bath water. Plans are often called upon to provide benefit estimates based upon incomplete information. They do so, however, with the caveat that they are only estimates and should not be relied upon. If plans were to follow the same tack as the Department in the NPRM, they would cease providing estimates, which would not be in the best interests of the plans' participants and beneficiaries.

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In its most recent Voluntary Corrections Program (“VCP”), which is part of the Internal Revenue Service’s (“IRS”) Employee Plans Compliance Resolution System (“EPCRS”), the IRS eliminated anonymous corrections. At the same time, recognizing the value of anonymous communication in advance of formal applications for a correction under the VCP, the IRS added “an anonymous, no-fee, VCP pre-submission conference procedure” Sec. 1.03, Rev. Proc. 2021-30, IRB 2021-31 (August 2, 2021). PTEs have never, of course, been provided on an anonymous basis, and the NCCMP agrees that such a procedure would not be appropriate and would conflict with the language of the statute. We do, however, ask that the Department take into account the value of pre-submission, informal conferences, as the IRS has done.

Party in Interest Under Investigations

The NPRM imposes new restrictions on the ability to obtain a PTE as follows:

The Department ordinarily will not consider:

(2) An application involving a transaction or transactions which are the subject of an investigation for possible violations of ERISA, the Code, FERSA, or any other Federal or state law; or an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department, the Internal Revenue Service, or any other regulatory entity to enforce ERISA, the Code, FERSA, or any other Federal or state laws.

Proposed 29 C.F.R. § 2570.33(a)(2). The first part of this proscription, that PTEs for transactions currently under investigation will ordinarily not be considered, is not unreasonable. Indeed, it posits a transaction that has already occurred and that has already become the subject of a governmental investigation. The second part, however, that an exemption will not be considered if the plan or any party in interest involved in the transaction is under investigation by any governmental authority for any reason, is a dramatically disproportionate and inappropriate response to what may be a trivial issue.

As the Department is well aware, employee benefit plans, particularly multiemployer plans, are frequently under audit or other investigation for a variety of reasons, including simply being the subject of a random audit. Many of these audits and investigations have no adverse findings, let alone any findings of wrongdoing. For example, in recent years, both the Department and the IRS have conducted routine investigations focusing on pension plans’ failures to commence benefits when legally required. Indeed, some of these investigations by the Department have lasted five or more years. Similarly, numerous health plans are now under examination to determine whether they are in violation of the Mental Health Parity and Addiction Equity Act and its subsequent

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amendments. Under this NPRM, however, such an investigation would preclude a plan from receiving a PTE for a totally unrelated transaction that has not yet even occurred.

Even more remarkably, as currently drafted, a party in interest involved in the contemplated transaction may be under investigation by local police following a traffic accident having no bearing on the transaction. Nevertheless, under the NPRM, such an investigation would be a sufficient basis for the Department to not even consider the PTE application.

This does not make sense and arbitrarily precludes relief in cases that may very well be in the best interests of the plan's participants and beneficiaries. At the very least, these types of cases should be evaluated on a case-by-case basis, without any presumption of disability.

Restrictive Insurance Requirements

Proposed 29 C.F.R. 2570.34(f)(2)(ii) includes restrictions on how insurance may be provided to an independent fiduciary involved in a transaction for which a PTE is sought. Specifically prohibited are contracts that:

- (i) Contain any provisions that violates ERISA section 410; [or]
- (ii) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent fiduciary by the plan or other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the independent fiduciary's work

The first element of this prohibition is, of course, nothing more than a restatement of existing law. The second piece of this, prohibiting any direct or indirect indemnification of the independent fiduciary or any other party, goes much farther. Under ERISA Section 410, a plan is prohibited from buying insurance to protect a fiduciary from personal liability. The plan is, however, explicitly permitted to buy insurance to protect itself, and the fiduciary may, at his or her own expense, or at the expense of an employer or employee organization, buy a so-called waiver of recourse rider for a nominal fee. *See also* I.B. 75-4, *Interpretive Bulletin on Indemnification of Fiduciaries*, 29 C.F.R. § 2509.75-4. The language of the NPRM is not clear whether it is intended to prohibit this statutorily-authorized practice with respect to independent fiduciaries. The preamble, however, strongly suggests that it is. As stated in the explanation of the proposed changes:

In order to ensure that qualified independent fiduciaries have sufficient resources to compensate plans for any losses for which they are liable, the Department proposes to require such fiduciaries to maintain fiduciary liability insurance in an amount that is sufficient to indemnify the plan for damages resulting from a breach by the independent

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fiduciary of either (1) ERISA, the Code, or any other Federal or state law or (2) its contract or engagement letter under proposed paragraph (f)(3). . . .

The Department understands that some entities that provide ERISA fiduciary services with respect to exemption transactions may not be either sufficiently liquid or capitalized to address liability that might arise in connection with an exemption transaction, especially in light of the proposal's language limiting indemnification, reimbursement, and waivers. Without the addition of paragraph (f)(3), the Department believes that the new provisions in paragraph (f)(2) may not provide the protections to plans and their participant and beneficiaries that the Department intends. By requiring independent fiduciaries to acquire and maintain fiduciary liability insurance, the Department believes the fiduciary is more likely to act prudently when serving as a fiduciary with respect to the exemption transaction, and plans, participants will receive better protection from liability resulting from fiduciary breaches.

77 Fed. Reg. 14730.

Because fiduciary insurance is prohibitively expensive for individuals and entities that are not well capitalized, this provision appears designed to steer plans to the professional independent fiduciary organizations. Although such organizations have their merits and are certainly appropriate in many cases, in at least some cases, a plan's interests, and therefore the interests of its participants and beneficiaries, are best served by independent fiduciaries who are not associated with such organizations. These independent fiduciaries may be experienced former trustees themselves or other professionals with special expertise who have not affiliated with a larger organization. Indeed, the Department routinely recommends the use of particular independent fiduciaries who are unaffiliated with larger organizations. It is not clear why the exclusion of these otherwise well qualified and experienced individuals serves anyone's interests.

In such cases, as the Department is aware, the plan will typically add the independent fiduciary to its own fiduciary policy, which can often be done at little expense, and then the independent fiduciary is permitted to buy a waiver of recourse rider at his or her own expense. Under the NPRM, however, it appears that the only way around using a larger organization would be for the plan to pay a higher fee sufficient to cover the full cost of a separate insurance policy. It is far from clear that imposing such additional expenses is in anyone's best interests.

2% Compensation Limit for Independent Fiduciaries

Similarly, the Department has also made its intention clear to confine the role of independent fiduciary to large organizations in proposed Section 2570.31(j). That provision prohibits the use of an independent fiduciary for whom the fees earned from any parties associated with the transaction, including those fees earned specifically as independent fiduciary for the proposed

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transaction, from amounting to more than 2% of his or her annual compensation. Once again, this restriction ensures that unaffiliated individuals and other small players are barred from serving as independent fiduciaries, without regard to their qualifications and expertise. This blanket prohibition only serves to drive up costs without any demonstrable benefit.

Automatic Denial of Withdrawn Applications

PTE requests are frequently withdrawn for a variety of reasons. Sometimes this is because the transaction was restructured to fit within an existing statutory or class PTE, sometimes because it was later determined that no PTE was required under the circumstances, and sometimes because the transaction was abandoned. Up to now, an applicant for a PTE could withdraw the application and no further action would be taken. In Section 2570.44(b) of the NPRM, the Department proposes to issue formal denials when transactions are withdrawn. This is problematic.

A formal denial of a PTE request creates a presumption that the applicant has done something wrong or that there is something inherently wrong with the proposed transaction. Such a presumption can be dangerous to the parties involved. If the parties have engaged in a prohibited transaction, then the remedy is to enforce ERISA's fiduciary and prohibited transaction rules. It is not to attempt to preempt *any* transaction from taking place, no matter how lawful and meritorious, by creating a presumption of wrongdoing. This only invites unnecessary and costly litigation. Furthermore, the knowledge that withdrawal of a PTE application will result in an automatic denial casts a pall over the entire process of seeking a PTE. This sanction is unwarranted and should be removed.

PTE Revocations Will Only Have Prospective Effect

Proposed 29 C.F.R. § 2570.50(c) provides that any revocation of a PTE will have prospective effect only. The rationale for this proposal is that the parties have expectation interests, which would not be served by retroactive revocation. We agree with the proposal and applaud the Department for seeking to adopt such a clear rule for exactly the reasons articulated by the Department. .

Conclusion

The ability to obtain administrative PTEs is important. Over the years, numerous such PTEs have been sought and many have been granted, both as individual exemptions and class exemptions. Due to both the breadth of the prohibited transaction rules and the complexity of the relationships between multiemployer plans and their many parties in interest and other stakeholders, these PTEs have been necessary for plans, and particularly multiemployer plans, to function practically and efficiently. It is because Congress understood that it would be impossible to anticipate every contingency that the Department was given broad authority to grant such exemptions. These

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considerations remain as true today as ever, and we are concerned that the proposed procedures would make it much more difficult and expensive to seek and obtain PTEs. Thus, although we applaud the Department's efforts to clarify the PTE application rules and to streamline the process, we are concerned that the newly-imposed barriers outlined above will unduly discourage plans from seeking PTEs. Because these PTEs are generally only sought where the proposed transactions are intended to benefit the plans' participants and beneficiaries, we ask that the Department not establish additional hurdles to the process.

Regards,

A handwritten signature in black ink, appearing to read "M. Scott", is centered within a light gray rectangular box.

Michael D. Scott
Executive Director