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DOL proposes stricter standards for prohibited transaction exemptions

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For the first time in over a decade, the Department of Labor (DOL) is [proposing](#) updates to its procedures for handling requests for prohibited transaction exemptions (PTEs). The proposal would increase DOL's scrutiny of PTE applications, require expanded disclosures, and impose stringent conditions for standards of conduct and avoidance of conflicts. Applying for an exemption would likely involve increased time and costs. The comment deadline is May 29.

ERISA exemption process

ERISA allows DOL to issue administrative PTEs on a [class](#) or an [individual](#) basis. Employers sometimes apply for individual PTEs for transactions not covered by existing exemptions — for instance, to make an in-kind contribution or allow the plan to receive warrants (or other rights) associated with employer stock. Plan service providers may also seek PTEs, but this article focuses on aspects of the DOL proposal most relevant to employers.

More rigor for presubmission communications

The proposal aims to provide a more formal framework for presubmission communications to connect them more closely to the actual PTE application. Prospective applicants could no longer maintain anonymity when asking for DOL's preliminary views about the viability of a potential PTE request. Presubmission communications would now have to identify the plan, applicant, and relevant parties involved; identify and fully describe the transaction; and specify the prohibited transactions at issue.

These communications, including oral statements, would become part of the administrative record and subject to public disclosure. Employers considering whether to pursue an exemption may have concerns about this change, particularly since the proposal states that previously granted PTEs don't guarantee DOL will issue similar ones — or require the same conditions — in the future.

Heightened standards for independence

Many PTEs require the involvement of an independent fiduciary and appraiser. Several aspects of the proposal would enhance the standards for identifying potential conflicts of interest among the parties involved in a PTE request, their affiliates and service providers.

- **Broader range of relationships considered.** DOL proposes adding a new definition of “party involved in the exemption transaction” that captures not only parties directly involved (and their affiliates) but also service providers, such as consultants and advisors.
- **Independent fiduciaries.** An independent fiduciary would have to be independent of and unrelated to not only any party involved in the exemption transaction, but also any other party involved in developing the PTE request. In addition, DOL would consider whether a fiduciary has an interest in the transaction or future transactions that may be similar. An independent fiduciary generally couldn’t receive more than 2% of its annual revenue from the parties involved in the transaction, but DOL could make exceptions. The proposal would also require an independent fiduciary to maintain sufficient levels of fiduciary liability insurance and would prohibit certain contractual provisions limiting the fiduciary’s liability.
- **Independent appraisers.** Appraisers would have to be independent of the independent fiduciary and other parties involved in the transaction and would be subject to the same compensation limits that apply to independent fiduciaries. The proposal would also prohibit certain contractual provisions limiting the liability of independent appraisers, auditors and accountants.

PTE applications would have to include information on the process for selecting and vetting any independent fiduciaries and appraisers (see next section).

Enhanced disclosures and transparency for PTE applications

The proposal would increase the information included in a PTE application and clarify the confidentiality and public availability of the administrative record. Applicants would have to promptly notify DOL of material changes to facts or representations during the agency’s consideration of an application and after a PTE is granted.

- **Information required in PTE applications.** To reduce the need for ongoing communications, DOL proposes to expand the information in PTE applications, which would include the following (among a larger list of items):
 - Contact information for all involved parties and their representatives
 - Reasons for the transaction and any material benefits to the parties involved
 - Costs and benefits — quantified to the extent possible — to the plan, its participants and the plan sponsor

- A detailed description of possible alternatives that don't involve a prohibited transaction and why they weren't pursued
 - Each conflict of interest or instance of self-dealing that would be permitted by the PTE
 - Parties who will bear the costs of the exemption application and additional expenses associated with the transaction — including the expense of notifying interested parties — to ensure the plan does not pay those costs (unless DOL finds a compelling reason that the plan should do so)
 - Prior transactions between the plan or the plan sponsor and a party involved in the transaction
 - Information about the process for selecting independent fiduciaries and appraisers, including such details as the due diligence performed and references contacted, as well as copies of the contracts with the independent fiduciary and any independent appraiser, auditor, or accountant
 - Other representations relating to the independence and responsibilities of the independent fiduciary and any independent appraiser, auditor, or accountant
- **Impartial conduct standards.** As a “baseline condition” for approval, PTE applications would have to include a statement that the transaction meets impartial conduct standards — reflective of those in [PTE 2020-02](#) on improving investment advice for workers and retirees — unless the applicant explains why those standards shouldn't apply.
 - **Notice and hearing.** For PTE applications requesting relief from ERISA's fiduciary self-dealing and conflict-of-interest prohibitions, the proposal would extend the right to a hearing to any person who may be “materially affected” by a PTE, as determined by DOL. This right currently is available only to interested persons who are adversely affected by a PTE.
 - **No confidentiality for administrative record.** The proposal would make the entire administrative record — including presubmission information and oral statements — open to the public from the moment the record is established, even after an application is withdrawn. Applicants who submit confidential information currently must withdraw the claim of confidentiality before DOL will consider the application. Under the proposal, DOL simply wouldn't consider an application containing any confidential information. This may raise concerns for plan sponsors, particularly in light of the new requirement to disclose their contracts with independent fiduciaries and appraisers, which may contain proprietary provisions.

Denial, withdrawal and revocation of PTEs

The proposal would clarify DOL's ability to issue a final denial of a PTE application without first issuing a tentative denial, including if an applicant doesn't include required information or respond in a timely manner. An applicant's withdrawal of a PTE application would also result in a final denial to document the ultimate disposition. In addition, DOL would have discretion to revoke or modify a PTE — but only prospectively — for material changes in facts, circumstances or representations. Material changes would

include an independent fiduciary's resignation, termination or criminal conviction — events about which the applicant must notify DOL within 30 days.

Request for comments

DOL requests comments on all aspects of the proposal, including whether the proposed changes would clarify the PTE procedures and reflect the ways entities interact with ERISA plans and their participants. DOL also is interested in whether it should consider other types of information in PTE applications. In response to requests from interested parties, DOL has extended the original April 14 comment deadline until May 29.

Related resources

Non-Mercer resources

- [Extension of comment period](#) (Federal Register, April 12, 2022)
- [Proposed procedures governing prohibited transaction exemption applications](#) (Federal Register, March 15, 2022)
- [Press release](#) (DOL, March 8, 2022)

Mercer Law & Policy resource

- [DOL finalizes more fiduciary investment guidance](#) (Dec. 22, 2020)

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