



DOL Finalizes Rule to Limit Carveouts on Transaction Bans

Plan sponsors that want permission to engage in prohibited transactions will have to file more paperwork. This may cut down on the number of such exemptions granted, a lawyer predicts.

By **David Isenberg** | January 24, 2024

The **Department of Labor** finalized a rule on Tuesday that will beef up the paperwork that plan sponsors will need to complete to obtain permission to engage in an otherwise prohibited transaction.

The new rule, proposed in 2022, changes the filing and processing procedures for plan sponsors and others that want to conduct transactions that are prohibited under the Employee Retirement Income Security Act.

It increases the information applicants must produce, updates the timing requirements for filings, lays out what items will be available for the public in the administrative record and expands opportunities for applicants to submit electronically.

“The amended exemption procedure will create more clarity, certainty and transparency around the exemption application process,” Assistant Secretary for Employee Benefits Security **Lisa Gomez** said in a press release. “Ensuring consistent and transparent procedures for the department to process exemption requests will benefit applicants and the public at large.”

However, it may also lead to fewer exemptions' being granted, said **Scott Mayland**, of counsel at **Groom Law Group**.

“Any time you increase the burdens of complying with a regulation, you could certainly have a narrower circumstance in which the DOL will grant the exemption,” he said. “They are saying to the extent there is any narrowing, they are doing whatever is appropriate and they are looking out for the plan participants.”

Erisa bans certain transactions that plan fiduciaries, sponsors, unions, service providers, affiliates and other so-called parties in interest can make.

But Congress allows certain exemptions to the rule, because they are considered routine or necessary for a plan to function, and because they have been deemed safe from conflicts of interest that would harm participant interests. These include transactions such as loans to participants and stock ownership plans, certain investment advice transactions involving plan participants and beneficiaries, and the investment of plan assets into regulated financial institutions.

Other prohibited transactions can be permitted to a group or individual if the transacting entities apply with the DOL, a process impacted by the DOL's new rule.

Generally, the request will be granted if it is administratively feasible and in the interest of the plan, its participants and beneficiaries, the final rule says.

Requests for exemption can take years, Mayland said.

But under the new rule, the process could become faster.

Because applicants will be required to provide more information upfront, the agency won't have to go back to them several times to ask for more information, Mayland said.

The rule also expands the definition of "qualified independent fiduciary" and "qualified independent appraiser," which are entities employed under the law to oversee certain exempted transactions.

The new definitions will impose more requirements and restrictions on both parties, Mayland said.

"I am struck that they doubled down on ensuring the independence of fiduciaries to further root out conflicts," said **Theresa Ghilarducci**, a professor at **The New School for Social Research**.

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Other parts of the 2022 proposal were walked back in response to industry feedback, Mayland said.

For example, the proposal would have denied exemptions of prohibited transactions for any entity that's under state or federal investigation for an Erisa violation.

However, that provision was narrowed in the final rule to only require that such entities disclose to the DOL if they're under investigation.

Industry trade groups, including the **Investment Company Institute**, argued that the proposal would discourage firms from seeking the exemption, which

could harm plan participants.

An ICI spokesperson declined to comment on the final rule.

A spokesperson for the **Insured Retirement Institute** said the trade group is still discussing the final rule with its members.

AARP, meanwhile, lauded the final rule for focusing "on the interests and protection of participants and beneficiaries," said **David Certner**, the group's legislative counsel and legislative policy director.

The final rule "will help ensure that any exemption is protective of their rights, as required by statute," he said.

Overall, the DOL has become more skeptical of individual applications for permission to engage in prohibited transactions, Mayland said.

"Their presumption is that they shouldn't allow them, because ... they are considered prohibited under Erisa," he said.

In 2021, the DOL approved just two exemptions, down from 46 in 2001, the **Securities Industry and Financial Markets Association** noted in its 2022 comment letter.

The DOL views transactions that benefit the plan sponsor and the plan's financial institution "very skeptically," Mayland said.

"They will think that the real reason you are seeking this individual exemption is that you are not benefiting plan participants, but you are trying to benefit the plan sponsor or the financial institution," he said. "You really have to prove that the financial benefit of the sponsor or financial institution is really minimal or is significantly outweighed by the benefit to the plan participant."

However, Mayland argues that isn't what Erisa requires.

"It just requires that the transaction will benefit the plan," he said. "It doesn't say that it can't benefit other parties."

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