



April 14, 2022

Via <http://www.regulations.gov> and e-mail

Chris Cosby
Acting Office Director
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Attention: Procedures Governing the Filing and Processing of Prohibited Transaction
Exemption Applications RIN 1210-ACO5/EBSA-2022-0003

Dear Acting Office Director Cosby:

AARP, on behalf of our 38 million members and all older Americans nationwide, appreciates the opportunity to submit comments on the Department of Labor's proposal to amend its procedures governing the filing and processing of prohibited transaction exemption applications.

A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. Many of our members currently participate, or have participated, in employer-sponsored retirement plans. Participants and beneficiaries rely on these plans for their long-term retirement and financial security. Fiduciaries must exercise their duties for the exclusive benefit of, and with complete and undivided loyalty to, plan participants and beneficiaries.

ERISA's legislative history indicates that the "crucible of congressional concern was the misuse and mismanagement of plan assets."¹ The general fiduciary obligations imposed by ERISA Section 404² are supplemented by the specific prohibitions of Section 406.³ Under Section 406(a),⁴ virtually all transactions between an employee benefit plan and a "party in interest" are prohibited unless a statutory or administrative exemption is available. Section 406(b)⁵ prohibits various forms of fiduciary self-dealing.

¹ *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n. 8 (1985) (describing legislative history).

² 29 U.S.C. § 1104.

³ 29 U.S.C. § 1106.

⁴ 29 U.S.C. § 1106(a).

⁵ 29 U.S.C. § 1106(b).

Although the prohibited transaction provisions are per se restrictions, Congress did provide an exemption procedure, but if, and only if, the Secretary of Labor determines both that the exemption is determined to be in the interests of plan participants and beneficiaries as well as protective of their rights.⁶ Congress concluded that the need to protect participants' retirement security was paramount.⁷

AARP supports the changes to the Prohibited Transaction process because it focuses on the interests and protection of participants and beneficiaries. In particular, AARP supports the requirement that an independent appraiser, auditor or accountant would need to include a signed and dated declaration under penalty of perjury that, to the best of its knowledge and belief, all of the representations made in any statement supporting the exemption are true and correct.

We appreciate the Department's interest and commitment to ensuring that participants and beneficiaries are protected. We are willing to provide any further assistance as needed.

If you have any questions, please feel free to contact Sarah Mysiewicz of our Government Affairs office at smysiewicz@aarp.org or 202-434-6763.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a stylized flourish at the end.

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs

⁶ Section 408(a)(2) & (3), 29 U.S.C. §1108(a)(2) & (a)(3). The Secretary must also determine that the exemption is administratively feasible. Section 408(a)(1), 29 U.S.C. §1108(a)(1). *See also* Code §4975(c)(2), (d).

⁷ S.Rep. No. 127, 93d Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. Admin. News 4838, 4868. *Accord*, H.R.Conf.Rep. No. 1280, 93d Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. Admin. News 4639, 5038, 5089-90.