

MEMO# 27281

June 6, 2013

DOL Issues Proposed Amendment to PTE 80-26 to Provide Retroactive and Temporary Prospective Relief to Plans and IRAs Subject to Indemnification Agreements

[27281]

June 6, 2013

TO: PENSION MEMBERS No. 25-13
BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 13-13
BROKER/DEALER ADVISORY COMMITTEE No. 26-13
OPERATIONS COMMITTEE No. 23-13 RE: DOL ISSUES PROPOSED AMENDMENT TO PTE 80-26 TO PROVIDE RETROACTIVE AND TEMPORARY PROSPECTIVE RELIEF TO PLANS AND IRAs SUBJECT TO INDEMNIFICATION AGREEMENTS

The Department of Labor has issued a proposed amendment to Prohibited Transaction Exemption (PTE) 80-26 that would provide retroactive and temporary prospective relief to plans and IRAs with indemnification agreements, as well as relief for certain loans and loan repayments made in accordance with such agreements. [\[1\]](#) In the preamble to the proposed amendment, the Department states that it is proposing the relief solely to enable financial institutions to remove such extensions of credit from account opening agreements and conclude any outstanding loans that may exist. The Department believes that broad retroactive relief and temporary exemptive relief is appropriate due to the apparently widespread misunderstanding as to the application of PTE 80-26 to the subject transactions. [\[2\]](#) Comments are due to the Department on or before July 23, 2013.

Background

As you may recall, the Department previously issued Advisory Opinion 2009-03, which concluded that it would be a prohibited transaction for an IRA owner to grant to a brokerage firm a security interest in the assets of non-IRA accounts held by the broker as a requirement for establishing and IRA with the broker. [\[3\]](#) Subsequently, the Department issued Advisory Opinion 2011-09A, which concluded that relief under PTE 80-26 is not available for an indemnification agreement between an IRA owner and a broker where the agreement is required in order for the IRA to engage in futures trading; and as a result,

entering into such an arrangement results in a prohibited transaction. [\[4\]](#)

In December 2011, the IRS issued Announcement 2011-81 providing temporary relief with respect to IRAs in circumstances in which the IRA owners signed certain indemnification agreements or granted certain security interests in accounts that may have an effect on their IRAs. [\[5\]](#) The announcement stated that the Department was considering further action to address these issues, including consideration of a class exemption request expected to be submitted to the Department. The IRS notice stated that, pending further action by the Department, the IRS would determine the tax consequences relating to an IRA without taking into account the consequences that might otherwise result from entering into any indemnification agreement or any cross-collateralization agreement (similar to the agreements described in the Department's advisory opinions), provided there has been no execution or other enforcement pursuant to the agreement against the assets of an IRA account of the individual granting the security interest or entering into the cross-collateralization agreement.

The Proposed Amendment

The proposed amendment would provide retroactive relief (to January 1, 1975) and temporary prospective relief (to six months after a final amendment is published in the federal register), for three types of transactions:

1. "Covered Extension of Credit." The proposed amendment includes within this type of transaction, an indemnification agreement, cross-collateralization agreement or other grant of a security interest in favor of a financial institution, as set forth in a written brokerage, futures, or other investment agreement between a plan and the financial institution, [\[6\]](#) which guarantees the payment of debits to (or by) a "Plan Account" by (or to) a "Related Account," [\[7\]](#) but does not include a loan or payment under such agreement or security interest.
2. "Covered Loan." The proposed amendment defines a "Covered Loan" as a loan to a Plan Account by a Related Account, including by means of a debit to a Related Account and a corresponding credit to the Plan Account, where the Covered Loan is made pursuant to a Covered Extension of Credit.
3. "Covered Repayment." A "Covered Repayment" intended to be covered by the proposed amendment is the repayment by a Plan Account to a Related Account of a Covered Loan.

The proposed amendment provides that the relief is subject to the following conditions:

1. No interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the Covered Extension of Credit, Covered Loan, or Covered Repayment;
2. The Covered Extension of Credit is set forth in an Account Opening Agreement between a plan and financial institution where the financial institution is subject to oversight by a regulatory agency or self-regulatory organization;
3. The Covered Loan is not directly or indirectly made by a plan;
4. The Covered Extension of Credit and the Covered Loan are not described in the ERISA or Internal Revenue Code provisions regarding ESOP loans;
5. The Covered Loan arose from a lawful cost (including a fee, expense, investment loss

or tax); and

6. The amount of a Covered Loan from a Related Account to a Plan Account is no greater than and related to an amount debited to the Plan Account in connection with an expense that arose from a lawful cost. The amount of a Covered Repayment of a Covered Loan must not be greater than the original Covered Loan amount.

Howard Bard
Associate Counsel

endnotes

[1] A copy of the proposed amendment is available here:
<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=26861>.

[2] The proposed amendment was requested by the Securities Industry and Financial Markets Association (SIFMA). Although SIFMA requested retroactive and permanent prospective relief, the Department is not proposing permanent prospective relief as it states that SIFMA has not proposed conditions that would address the proper oversight, monitoring, and reporting of a loan or repayment, or that would otherwise support a finding that an extension of credit for which the exemptive relief was requested is protective of IRAs or other plans. The Department noted, however, that future exemptive relief may be available to the extent all of the requisite findings under ERISA section 408(a) can be made.

[3] See [Memorandum](#) to Pension Members No. 53-09, Bank Trust and Recordkeeper Advisory Committee No. 51-09, Broker/Dealer Advisory Committee No. 62-09 [23944], dated November 10, 2009.

[4] See [Memorandum](#) to Pension Members No. 63-11, Bank Trust and Retirement Advisory Committee No. 75-11, Broker/Dealer Advisory Committee No. 80-11 [23944], dated November 30, 2011.

[5] A copy of IRS Announcement 2011-81 is available here:
<http://www.irs.gov/pub/irs-drop/a-11-81.pdf>.

[6] The proposed Amendment uses the term “Account Opening Agreement” to include such agreements.

[7] For purposes of the proposed amendment, a “Plan Account” is defined as an account established with a financial institution by an employee benefit plan as defined in ERISA section 3(3) or IRC Section 4975(e)(1) (and therefore includes IRAs), and a “Related Account” is defined as an investment account established with a financial institution by a person or entity, where such account is subject to an Account Opening Agreement with the financial institution that also covers a Plan Account and/or guarantees the payment of debits to the Plan Account.