

MEMO# 33627

June 29, 2021

DOL Reopens Comment Period on 2013 Amendments to Remove Credit Rating References from PTEs

[33627]

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Reopens Comment Period on 2013 Amendments to Remove Credit Rating References from PTEs

The Department of Labor (DOL) recently announced that it was reopening the comment period on its 2013 proposal^[1] to amend six prohibited transaction class exemptions (PTEs) to remove references to credit ratings pursuant to the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).^[2] In each of the six PTEs, DOL conditioned the exemption on the security or other financial product, or its issuer or guarantor, receiving a specified minimum credit rating.

Additional comments are due by August 9, 2021. DOL confirms that prior comments on the 2013 proposal will be included in the public record and need not be resubmitted.

ICI Comment Letter

ICI submitted a comment letter in 2013 (one of only three letters submitted on the proposal).^[3] ICI's letter focused on DOL's proposed amendment to PTE 2006-16, which generally provides a class exemption for the lending of securities that are plan assets to certain banks and broker-dealers that are parties in interest to the plan and for the payment to a fiduciary of compensation for services rendered in connection with securities lending, if certain conditions are met. ICI's letter recommended that, given that DOL considered and appears to have relied upon proposed amendments to SEC Rules 2a-7 and 5b-3, DOL should await the SEC's issuance of final amendments to Rules 2a-7 and 5b-3 prior to finalizing the amendment.

The SEC has since finalized its amendments to Rules 2a-7 and 5b-3 in 2015 and 2014, respectively.^[4]

Comments Requested

DOL staff explains that "[g]iven the passage of time, the Department of Labor wants to ensure all interested parties have an opportunity to provide comments or new information to consider as we finalize the proposal. As such, we are reopening the comment period and soliciting comments on all aspects of the 2013 proposal."^[5]

DOL also specifically requests comments regarding the following questions:^[6]

- Are changes to the 2013 proposal's standards of creditworthiness necessary as a result of the SEC's finalization of amendments to Rules 2a-7 and 5b-3?
- Are changes to the 2013 proposal's standards of creditworthiness necessary as a result of other regulators' actions removing references to credit ratings? For example, should DOL incorporate OCC, Federal Reserve Board, FDIC and/or NCUA standards developed for depository institutions? Have other regulators developed standards DOL should incorporate into the PTEs? Are there particular challenges in the ERISA context to implementing any of those standards?
- Are changes to the 2013 proposal's standards of creditworthiness necessary in light of business or other economic developments since DOL proposed changes to the PTEs in 2013?
- Should references to "fair market value" in the 2013 proposal's standards of creditworthiness be replaced with references to "carrying value"? If so, please explain why.^[7]
- Do commenters recommend that DOL require financial institutions to adopt policies and procedures for compliance with the standards of creditworthiness? If so, please describe the types of specific policies and procedures that would be helpful. Do financial institutions already have similar policies and procedures in place? Will 180 days provide sufficient time for financial institutions that currently do not have such policies and procedures in place to adopt them?^[8]

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endnotes

^[1] The notice was published at 86 Fed. Reg. 33360 (June 24, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-06-24/pdf/2021-13149.pdf>. DOL's news release, dated June 23, 2021, is *available at* <https://www.dol.gov/newsroom/releases/ebsa/ebsa20210623>. The 2013 proposal would amend Class Prohibited Transaction Exemptions 75-1, 80-83, 81-8, 95-60, 97-41 and 2006-16. For a description of the proposed amendments, see ICI Memorandum No. 27367, dated July 10, 2013, *available at* <https://www.ici.org/memo27367>.

^[2] Section 939A of Dodd-Frank requires each Federal agency to review any regulation it issued that requires the use of an assessment of the creditworthiness of a security or money market instrument, modify such regulation to remove any reference to or requirement of reliance on credit ratings and substitute in such regulations a standard of creditworthiness as each respective agency deems appropriate.

^[3] For a summary of ICI's letter, see ICI Memorandum No. 27478, dated August 20, 2013, *available at* <https://www.ici.org/memo27478>.

[4] For a summary of the amendments to Rule 5b-3, see ICI Memorandum No. 27845, dated January 15, 2014, available at <https://www.ici.org/memo27845>. For a summary of the amendments to Rule 2a-7, see ICI Memorandum No. 29357, dated September 18, 2015, available at <https://www.ici.org/memo29357>.

[5] See statement from Ali Khawar, Acting Assistant Secretary of Labor for Employee Benefits Security, in DOL's news release available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20210623>.

[6] See 86 Fed. Reg. at 33363.

[7] In the notice, DOL highlights the fiduciary rulemaking finalized in 2016 and later vacated by the Fifth Circuit, which included an Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (the Proposed Principal Transactions Exemption). DOL received a number of comments regarding the standards of creditworthiness in that proposed PTE, including the comment that the standard use the term "carrying value" rather than "fair market value." See 86 Fed. Reg. at 33362.

[8] DOL notes that if it adopts final amendments, they would be effective 180 days after the date of their publication in the *Federal Register*. See 86 Fed. Reg. at 33360.