



July 23, 2013

U.S. Department of Labor  
Employee Benefits Security Administration  
The Office of Exemption Determinations  
200 Constitution Avenue, N.W., Room N-5700  
Washington, DC 20210

**Re: Proposed Amendment to PTE 80-26**

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> is pleased to provide comments regarding the Department of Labor’s (“Department”) proposed amendment to PTE 80-26 under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the Internal Revenue Code of 1986, as amended (“Code”). We appreciate that the Department has proposed relief to avoid the unexpected taxation of IRAs, and the loss of tax-qualified retirement savings for those IRAs.

Our comments follow.

1. The exemption’s effective date language can be read to deny relief after the end of the 6 month period provided by the exemption to amend existing agreements. In other words, after the end of the six month period, there is no relief for the past. We know that is not what you intended. We believe you may want to restate this language as follows:

Effective January 1, 1975, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(1) and (2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B), (D) and (E) of the Code, shall not apply to (1) a Covered Extension of Credit, as defined in section VI(e); (2) a Covered Loan, as defined in section VI(f); and (3) a Covered Repayment, as defined in section VI(g) if:

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<sup>1</sup> The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

(a) No Covered Extension of Credit, Covered Loan or Covered Repayment remains in effect after the date that is eighteen months following the date a final amendment is published in the Federal Register.

2. As we have discussed with you, language creating a lien or otherwise making accounts responsible for each other is found in many agreements. As the Department has recognized in many exemptions, seeking written signatures on amendments is impractical, burdensome, very expensive, and likely impossible. If written signatures were required, our members would likely have to close thousands of these accounts shortly before your 6-month deadline. In addition, it would be enormously burdensome to tailor mailings to clients based on the types of accounts each may maintain. Accordingly, we would like the Department to confirm that a universal, unilateral written amendment that makes clear that any cross-collateralization provision in any IRA or plan agreement is void, invalid and of no force and effect will meet the requirements of the exemption. We would also like the Department to clarify that when the preamble notes that six months will give financial institutions ample time to “remove” Covered Extensions of Credit from client agreements, the Department understands that removal can be by superseding language in a separate document, as described above. Finally, our members are very concerned that six months is not adequate to create new documents in every line of business using the precise definitions that the Department has used, which, of course, we did not have prior to the proposal and as discussed in this comment letter, may still change a bit. Accordingly, we urge the Department to provide at least 18 months for all documents to be “stickered” or revised, so long as no action is taken after final publication in reliance on the cross collateralization language.
3. Section V(c) provides that the covered loan may not be made directly or indirectly by a plan. While this situation may not be frequent, we respectfully request that the Department consider amending this condition to read as follows:
  - (c) The Covered Loan is not directly or indirectly made by a Plan, unless such loan has been repaid in full, with interest, by the date that is described in subsection (a).
4. Section V(e) uses the term “lawful costs”. We believe that term is misleading and could lead to additional litigation and confusion. We request that the language read as follows:

“The Covered Loan resulted from trading losses, including but not limited to an investment loss, margin call, or other damages in connection with a failed trade, unmet margin call or investment loss.” We urge you not to use the terms tax, expense or fee, since section I of the exemption has long been interpreted to allow a plan sponsor to pay administrative fees of a plan, and to agree to be responsible for those fees. See IRS Revenue Ruling 86-142 and numerous private letter rulings relying on that Revenue Ruling.
5. Section V(f) excludes accumulated interest from the definition of a Covered Repayment. As we know the Department appreciates, where a trade results in a loss to the financial institution or other counterparty, accumulated interest is always charged. It is not realistic to assume that the repayment will not include interest, since interest is part of the “loss”. It undercuts the usefulness of the exemption if the interest component is

prohibited, and for these reasons, we request that the Department amend section (f) to permit where the related party covered assessed interest.

6. Section VI(e) defines Covered Extension of Credit as an indemnification, etc. in favor of the financial institution. We note that the indemnification may be in favor of another service provider to the plan, or to a counterparty.
7. Also in Section VI(e), we think the language “or other grant of a security interest” assumes that the indemnification agreement or cross-collateralization agreement always give rise to a lien. We do not believe the Department means to exclude relief just because a lien was not created. Accordingly, we request that the Department revise the language to refer to “an indemnification agreement, cross-collateralization agreement, or any other similar agreement or arrangement, including but not limited to the grant of a security lien”.
8. Also in section VI(e), we think the use of the term “payment of debits” is incorrect, in that a debit is an accounting term, may or may not include interest and may not technically be a debt of the account. We would revise that language to say “guarantees the payment of amounts described in Section V(g)”. See, in this connection, point 5 above.
9. Also in Section VI(e), we request that you clarify the use of the term loan so that the language reads “but does not include an actual payment under such agreement or security interest”.
10. In Section VI(i), we believe the definition is overly narrow. We request that the term “Account Agreement” be used throughout and that the definition be amended to read as follows:

“For purposes of Section V, the term “Account Agreement” means a written account opening agreement, IRA agreement, custodial agreement, brokerage, futures, securities lending or other agreement which requires or permits Covered Extensions of Credit and Covered Loans.”

We appreciate all the work that the Department has done to propose this relief, and we look forward to working with you to finalize it.

Sincerely,



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Securities Industry and Financial Markets Association