This document is scheduled to be published in the
Federal Register on 06/24/2021 and available online at
federalregister.gov/d/2021-13149, and on **govinfo.gov**

4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Number D-11681]

RIN 1210-ZA18

Reopening of Comment Period for Proposed Amendments to Class Prohibited Transaction Exemptions to Remove Credit Ratings Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of reopening of comment period.

SUMMARY: The Department of Labor is reopening the comment period on proposed amendments to six class exemptions from prohibited transaction rules set forth in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The exemptions are Prohibited Transaction Exemptions (PTEs) 75-1, 80-83, 81-8, 95-60, 97-41 and 2006-16. The proposed amendments relate to the use of credit ratings in the conditions of these class exemptions. Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Department to remove any references to or requirements of reliance on credit ratings from its class exemptions and to substitute standards of creditworthiness as the Department determines to be appropriate. This reopening of the comment period provides interested persons with the opportunity to submit additional comments on the proposed amendments due to the passage of time since the proposal was originally published in 2013. All comments received to date on the proposed amendments will be included in the public record and need not be resubmitted. The proposed amendments to the class exemptions would affect participants and beneficiaries of employee benefit plans and IRAs, fiduciaries of the plans and IRAs, and financial institutions that engage in transactions with, or provide

services to, the plans and IRAs.

DATES: The Department is reopening the comment period for proposed amendments to certain class exemptions that were published in the Federal Register on June 21, 2013 (78 FR 37572). Written comments and requests for a public hearing must be received by the Department on or before [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If the Department adopts final amendments, they would be effective 180 days after the date of their publication in the FEDERAL REGISTER.

ADDRESSES: All written comments and requests for a public hearing concerning the proposed amendments should be sent to the Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor through the Federal eRulemaking Portal and identified by Application No. D-11681:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA 2012–0013 (follow the instructions for submitting comments).

Warning: All comments received will be included in the public record without change and will be made available online at http://www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the http://www.regulations.gov website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it. If you

send an email directly to EBSA without going through http://www.regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the Internet.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8557 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),[1] Congress found that credit ratings of certain financial products proved to be inaccurate and had "contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy in the United States and around the world."[2] Dodd-Frank section 939A requires federal agencies, including the Department, to review any regulation that references or includes requirements regarding credit ratings, remove the references or requirements, and substitute standards of creditworthiness as the agency deems appropriate.

Pursuant to Dodd-Frank section 939A, the Department conducted a review of its class prohibited transaction exemptions. In the absence of an exemption, ERISA and the Code prohibit certain transactions involving employee benefit plans and IRAs. Class exemptions allow parties to engage in specified transactions that would otherwise be prohibited, so long as the parties satisfy the conditions and definitional provisions of the exemption. Under ERISA section 408(a), the Department may grant prohibited transaction exemptions provided the Secretary of Labor finds that the exemption is (i) administratively feasible, (ii) in the interests of plans and their participants and

[1] Pub. L. 111-203, 124 Stat. 1376 (2010).
[2] *Id.*, section 931(5).

beneficiaries, and (iii) protective of the rights of participants and beneficiaries of the plans.[3]

The Department's review of its class exemptions identified Prohibited Transaction Exemptions (PTEs) 75-1, Parts III & IV,[4] 80-83,[5] 81-8,[6] 95-60,[7] 97-41,[8] 2006-16[9] (each, a "Class Exemption," and collectively, the "Class Exemptions") as those including references to, or requiring reliance on, credit ratings. Each Class Exemption allows certain parties to engage in a financial transaction involving a plan or IRA, and, in each Class Exemption the Department conditioned the exemption on the security or other financial product or its issuer or guarantor receiving a specified minimum credit rating. The credit rating requirements range from a rating in one of the four highest generic categories of credit ratings (also known as an "investment grade" rating) to a rating in one of the two highest generic categories, from a nationally recognized statistical rating organization. The credit rating conditions are one component of the safeguards established in each Class Exemption to protect the interests of plans, their participants and beneficiaries, and IRA owners entering into transactions covered by the Class Exemptions.

2013 Proposal

On June 21, 2013, following its review of the Class Exemptions, the Department issued proposed amendments to the Class Exemptions to remove references to, and requirements of reliance on, credit ratings (2013 Proposal).[10] In drafting the proposed

---

[3] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (2018), transferred this authority from the Secretary of the Treasury to the Secretary of Labor. Therefore, this notice is issued solely by the Department.
[4] 40 FR 50845 (October 31, 1975), as amended by 71 FR 5883 (February 3, 2006).
[5] 45 FR 73189 (November 4, 1980), as amended by 67 FR 9483 (March 1, 2002).
[6] 46 FR 7511 (January 23, 1981), as corrected at 46 FR 10570 (February 3, 1981) and as amended by 50 FR 14043 (April 9, 1985) and 67 FR 9483 (March 1, 2002).
[7] 60 FR 35925 (July 12, 1995), as amended by 67 FR 9483 (March 1, 2002).
[8] 62 FR 42830 (August 8, 1997).
[9] 71 FR 63786 (October 31, 2006).
[10] 78 FR 37572 (June 21, 2013). The Department proposed the amendments on its own motion, pursuant to

amendments, the Department focused on alternatives to credit ratings requirements set forth in three releases by the Securities and Exchange Commission (SEC). The SEC releases included proposed amendments to rules 2a-7 and 5b-3 (Rule 2a-7 and Rule 5b-3);[11] a final amendment to rule 10f-3 (Rule 10f-3),[12] and a new rule 6a-5 (Rule 6a-5),[13] all under the Investment Company Act of 1940.

In the 2013 Proposal, the Department set forth the following approaches to the various credit ratings requirements in the Class Exemptions. For PTEs 75-1, Parts III and IV, and 80-83, which each conditioned the exemption in part on certain securities involved being "rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization," the Department proposed to replace this condition with a requirement that the securities be "(i) subject to no greater than moderate credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time." In doing so, the Department relied on Rules 6a-5 and 10f-3.

For PTE 81-8, which permits employee benefit plans and IRAs to invest in commercial paper that, among other things, possesses a rating in "one of the three highest rating categories by at least one nationally recognized statistical rating service," the Department proposed instead to require the commercial paper to be "(i) subject to a minimal or low amount of credit risk based on factors pertaining to credit quality and the issuer's ability to meet its short-term financial obligations and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time." In doing so, the Department relied on Rule 10f-3 and the proposed

---

ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

[11] References to Credit Ratings in Certain Investment Company Act Rules and Forms, Release Nos. 33–9193, IC–29592; 76 FR 12896 (March 9, 2011).

[12] References to Ratings of Nationally Recognized Statistical Rating Organizations, Release Nos. 34–60789, IC–28939; 74 FR 52358 (October 9, 2009).

[13] Purchase of Certain Debt Securities by Business and Industrial Development Companies Relying on an Investment Company Act Exemption, Release No. IC–30268; 77 FR 70117 (November 23, 2012).

amendment to Rule 2a-7.

PTE 2006-16 allows securities lending transactions secured by foreign collateral including (i) foreign sovereign debt securities if the issue, issuer or guarantor has a rating in one of the two highest rating categories from a nationally recognized statistical rating organization, and (ii) irrevocable letters of credit issued by foreign banks with a counterparty rating of investment grade or better as determined by a nationally recognized statistical rating organization. The Department proposed to replace the requirement for foreign sovereign debt securities issue, issuer or guarantor to be in the two highest ratings categories with a requirement that they be "(i) subject to a minimal amount of credit risk, and (ii) sufficiently liquid that such securities can be sold at or near their fair market value in the ordinary course of business within seven calendar days." In doing so, the Department relied on the proposed amendments to Rules 2a-7 and 5b-3. The Department proposed to replace the requirement that foreign banks issuing letters of credit receive an "investment grade" counterparty rating with a requirement that the bank's ability to honor its commitments thereunder be subject to "no greater than moderate credit risk," relying on Rule 6a-5.

Finally, the Department proposed to eliminate certain references to credit ratings in PTEs 95-60 and 97-41 and replace them with references to credit quality.[14]

The Department received three comments in response to the 2013 Proposal. The comments were generally supportive of the Department's approach in light of the statutory requirement to remove credit ratings references and requirements, and commenters did not suggest specific changes to the language of the amendments. Commenters did suggest that the Department provide additional guidance on satisfaction of the new standards, and requested that the Department delay finalizing the 2013

---

[14] *See* PTE 95-60 Section III(a)(2)(B) and PTE 97-41 Section II(c)(2), discussed in the 2013 Proposal, 78 FR at 37579-80.

Proposal until the SEC had finalized all of its proposals. Following the receipt of these comments, the Department did not finalize the amendments as it focused on other priorities. Due to the passage of time, the Department is now seeking comments that take into account developments that have occurred since the Department issued and received comments on the 2013 Proposal.

Other Regulators

The SEC has finalized the amendments to Rules 2a-7 and 5b-3 since the Department's 2013 Proposal. The SEC re-proposed an amendment to Rule 2a-7 in 2014, and finalized the amendment in 2015.[15] The SEC also finalized its amendment to Rule 5b-3 in 2014.[16] While the SEC made changes to the language in response to comments, the final amendments generally took the same approach to replacing references to credit ratings with alternative methods for determining credit quality.

Other regulators have also replaced credit rating standards in their regulations using different standards than the Department used in its 2013 Proposal. For example, in October 2013, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Federal Reserve Board), and the Federal Deposit Insurance Corporation (FDIC), issued a joint agreement to revise an existing agreement and replace references to credit ratings with alternative standards of creditworthiness consistent with Dodd-Frank.[17] The revised agreement provides that a security is investment grade if the issuer of the security has an adequate capacity to meet financial commitments for the life of the asset. An issuer has adequate capacity to meet

---

[15] Removal of Certain References to Credit Ratings and Amendment to the Issuer Diversification Requirement in the Money Market Fund Rule (Re-proposed Rule and Proposed Rule), 79 FR 47986 (August 14, 2014); Removal of Certain References to Credit Ratings and Amendment to the Issuer Diversification Requirement in the Money Market Fund Rule (Final Rule), 80 FR 58124 (September 25, 2015).

[16] Removal of Certain References to Credit Ratings under the Investment Company Act (Final Rule), 79 FR 1316 (January 8, 2014).

[17] Uniform Agreement on the Classification and Appraisal of Securities Held by Depository Institutions (Agreement), October 29, 2013, *available at* https://www.federalreserve.gov/supervisionreg/srletters/sr1318a1.pdf

its financial commitments if the risk of default is low, and the full and timely repayment of principal and interest is expected. The National Credit Union Administration (NCUA) used similar language to define "investment grade" in the 2012 rule amendment.[18] The rule provides that *investment grade* means the issuer of a security has an adequate capacity to meet the financial commitments under the security for the projected life of the asset or exposure, even under adverse economic conditions (12 CFR 704.2). An issuer has an adequate capacity to meet financial commitments if the risk of default by the obligor is low and the full and timely repayment of principal and interest on the security is expected. (*Id.*). NCUA also defined a higher standard, "minimal amount of credit risk," as the amount of credit risk when the issuer of a security has a very strong capacity to meet all financial commitments under the security for the projected life of the asset or exposure, even under adverse economic conditions (*Id.*). An issuer has a very strong capacity to meet all financial commitments if the risk of default by the obligor is very low, and the full and timely repayment of principal and interest on the security is expected. (*Id.*)

2015-2016 Rulemaking

In 2015 and 2016, the Department also engaged in a rulemaking regarding the definition of an investment advice fiduciary under ERISA and the Internal Revenue Code, which included publication of the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (the Proposed Principal Transactions Exemption).[19] The Proposed Principal Transactions Exemption included conditions imposing standards of creditworthiness that were similar to those provided in the 2013 Proposal. Specifically, under the proposal, a debt security purchased by or sold to a plan or IRA in

---

[18] Alternatives to the Use of Credit Ratings (Final Rule) 77 FR 74103 (December 13, 2012),
[19] 80 FR 21989 (April 20, 2015).

a principal transaction with an investment advice fiduciary would have to "[p]ossess[] no greater than a moderate credit risk; and . . .[be] sufficiently liquid that the Debt Security could be sold at or near its fair market value within a reasonably short period of time."

In comparison to comments on the 2013 Proposal, the Department received significant comments on the standards of creditworthiness in the Proposed Principal Transactions Exemption. Commenters generally stated that the standard lacked objectivity, and some commenters expressed the view that the Department's reliance on Rule 6a-5 was misplaced because the SEC used the standard in a different context. Further, commenters requested that the standard use the term "carrying value" rather than "fair market value." Finally, one commenter suggested that the Department require financial institutions to establish policies and procedures to determine how credit risk and liquidity will be assessed, as a means of operationalizing the requirements. Based on these comments, the Department finalized the Principal Transactions Exemption with revised standards of creditworthiness that require the debt security to (i) possess "no greater than a moderate credit risk;" and (ii) be "sufficiently liquid" that it "could be sold at or near its carrying value within a reasonably short period of time."[20]

Request for Comment

Due to the passage of time since the 2013 Proposal was originally published, and to ensure that all interested parties have an opportunity to provide comments or new information, the Department is reopening the comment period and soliciting comments on all aspects of the 2013 Proposal. The Department specifically seeks comment regarding the following questions:

- Are changes to the 2013 Proposal's standards of creditworthiness necessary as a

---

[20] *See* Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 81 FR 21089, 21119-20 (April 8, 2016). The U.S. Court of Appeals for the Fifth Circuit later vacated the exemption on unrelated grounds. *Chamber of Commerce of the United States v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).

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 the Department incorporate OCC, Federal Reserve Board, FDIC and/or NCUA standards developed for depository institutions? Have other regulators developed standards the Department should incorporate into the Class Exemptions? 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 the Department proposed changes to the Class Exemptions 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.
- Do commenters recommend that the Department 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 currently such policies and procedures in place to adopt them?

Signed at Washington, DC, this 16th day of June, 2021.

Ali Khawar,
Acting Assistant Secretary,
Employee Benefits Security Administration,
U.S. Department of Labor.

[FR Doc. 2021-13149 Filed: 6/23/2021 8:45 am; Publication Date: 6/24/2021]