DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Number D–11716]

RIN 1210–ZA21

Notice of Proposed Amendment to Prohibited Transaction Exemption 80–26 (PTE 80–26) For Certain Interest Free Loans to Employee Benefit Plans

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of Proposed Amendment to PTE 80–26.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 80–26. PTE 80–26 is a class exemption that permits parties in interest with respect to employee benefit plans to make certain interest free loans and extensions of credit to such plans, provided the conditions of the exemption are met. The proposed amendment, if adopted, would give retroactive and temporary exemptive relief for certain guarantees of the payment of debits to plan investment accounts (including IRAs) by parties in interest to such plans as well as certain loans and loan repayments made pursuant to such guarantees. The proposed amendment would affect employee benefit plans described in section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and plans described in section 4975(e)(1) of the Internal Revenue Code of 1986, as amended (the Code), the participants and beneficiaries of such plans, and parties in interest with respect to those plans engaging in the described transactions.

DATES: If adopted, the proposed amendment will be effective from January 1, 1975, until the date that is six months after the date on which an adopted amendment is published in the **Federal Register**. Written comments and requests for a public hearing should be received by the Department on or before July 23, 2013.

ADDRESSES: All written comments and requests for a public hearing concerning the proposed amendment should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attention: PTE 80–26 Amendment. Interested persons are also invited to submit comments and hearing requests to EBSA, by the end of the scheduled comment period, via email to: *moffitt.betty@dol.gov* or by using the Federal eRulemaking portal at *http://regulations.gov*, Docket ID: EBSA–2012–0030 (following the instructions for the submission of comments found on this Web site). The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments and hearing requests will also be available online at *www.regulations.gov* and *www.dol.gov/ebsa*, at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Chris Motta, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8540 (this is not a toll-free number).

Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, it has been determined that this action is not ''significant'' within the meaning of section 3(f) of the Executive Order and therefore is not subject to review by OMB.

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 80–26.[1] PTE 80–26 provides an exemption from the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(2) of ERISA and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B) and (D) of the Code.

The proposed amendment was requested by the Securities Industry and Financial Markets Association (SIFMA) pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, October 27, 2011).[2] SIFMA requests that the relief provided by this proposed amendment to PTE 80–26 include relief from section 406(b)(1) of ERISA and section 4975(c)(1)(E) of the Code.[3] In addition to proposing certain relief requested by SIFMA, the

[1] 45 FR 28545 (April 29, 1980), as corrected at 45 FR 35040 (May 23, 1980) and amended at: 65 FR 17540 (April 3, 2000); 67 FR 9483 (March 1, 2002); 67 FR 9485 (March 1, 2002); and 71 FR 17917 (April 7, 2006).

[2] Section 102 of the Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 [1996]) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975 of the Code to the Secretary of Labor.

[3] Hereinafter, references to specific provisions of ERISA should be read as referring also to the corresponding provisions of section 4975 of the Code.

Department is proposing on its own motion another amendment to PTE 80–26.

A. General Background

The prohibited transaction provisions of the Act generally prohibit transactions between a plan and a party in interest (including a fiduciary) with respect to such plan. Specifically, section 406(a)(1)(B) and (D) of the Act provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(B) lending of money or other extension of credit between the plan and a party in interest; and

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Section 4975(c)(1)(B) and (D) of the Code contain parallel provisions with respect to plans described in section 4975(e)(1) of the Code.

Accordingly, unless a statutory or administrative exemption is applicable, loans, including interest free loans, extensions of credit, and repayment of such loans, between a plan and a party in interest, are prohibited.

In addition, section 406(b)(1) and (b)(2) of the Act prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his own interest or for his own account, and from acting in his individual capacity or any other capacity in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Section 4975(c)(1)(E) of the Code contains a parallel provision to section 406(b)(1) of the Act. Section 4975 of the Code does not contain a parallel provision with respect to section 406(b)(2) of the Act.

Prohibited transactions that involve plans described in section 4975(e)(1) of the Code, including individual retirement accounts (IRAs), are generally subject to taxation under section 4975 of the Code. Additionally, section 408(e)(2) of the Code provides that if, during any taxable year of the individual for whose benefit any IRA is established, that individual or his or her beneficiary (hereinafter, an IRA Owner) engages in any transaction prohibited by section 4975 with respect to such account, such account ceases to be an IRA as of the first day of such taxable year.

B. Description of Class Exemption

The general exemption in PTE 80–26,[4] as amended effective December 15, 2004, permits the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, and the repayment of such loan or other extension of credit in accordance with its terms or other written modifications thereof, if:

(a) 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 loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only—

(1) for the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or

(2) for a purpose incidental to the ordinary operation of the plan;

(c) The loan or extension of credit is unsecured;

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan;

(e) The loan is not described in section 408(b)(3) of ERISA and the regulations promulgated thereunder (29 CFR 2550.408b–3) or section 4975(d)(3) of the Code and the regulations promulgated thereunder (26 CFR 54.4975–7(b)); and

(f)(1) Any loan described in section IV(b)(1) that is entered into on or after April 7, 2006 and that has a term of 60 days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan;

(2) Any loan described in (b)(2) of this paragraph that is entered into for a term of 60 days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan.

For transactions that meet these conditions, the restrictions of ERISA section 406(a)(1)(B) and (D) and ERISA section 406(b)(2), and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B) and (D) of the Code, do not apply.

The most recent amendment to PTE 80–26 was finalized on April 7, 2006, but was generally effective December 15, 2004. The purpose of the amendment was to eliminate a requirement of the exemption that the proceeds of certain loans or extensions of credit be used only for a period of no more than three business days.[5] Additionally, as part of the amendment, the Department added conditions (e) and (f), above. The effective date of those conditions relates to the date of the publication of the final amendment as opposed to the effective date of the proposed amendment.

On March 1, 2002, the Department adopted an amendment affecting several class exemptions, including PTE 80–26.[6] The amendment defines the terms ''employee benefit plan'' and ''plan'' for purposes of the affected class exemptions as ''an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code.'' Accordingly, the Department clarified that PTE 80–26 provided relief for transactions involving IRAs.

C. Background on This Proposed Amendment to PTE 80–26

On October 27, 2009, the Department issued Advisory Opinion 2009–03A, which states that the grant by an IRA Owner to a broker of a security interest in the IRA Owner's non-IRA accounts with the broker, in order to cover indebtedness of, or arising from, the IRA, would be an impermissible ''extension of credit'' under section 4975(c)(1)(B) of the Code. Thereafter, on October 20, 2011, the Department issued Advisory Opinion 2011–09A, which states that an IRA Owner's agreement to indemnify the broker for losses suffered by the IRA account with the broker (hereinafter, an indemnification agreement)[7] is not within the scope of relief provided by PTE 80–26. The Department opined that the proceeds of such an indemnification agreement would not be used to pay ordinary operating expenses of the plan or for a purpose incidental to the ordinary operation of the plan, as required by section IV(b) of the exemption.

Subsequent to the issuance of Advisory Opinion 2011–09A, several practitioners informally notified the Department that documents governing the investment of an IRA's or any other

[4] The general exemption is set forth in section IV of PTE 80–26. Sections I–III of the exemption provided relief for limited time periods, all of which have expired.

[5] See Amendment to Prohibited Transaction Exemption 80–26 (PTE 80–26) for Certain Interest Free Loans to Employee Benefit Plans, 71 FR 17917 (April 7, 2006).

[6] 67 FR 9483.

[7] The Department notes that various terms are used throughout this proposed amendment to PTE 80–26 to describe the types of provisions at issue. For example, there are references to ''security interests,'' ''indemnification agreements,'' and ''cross-collateralization agreements,'' discussed below. For simplicity, where possible, the Department uses the term indemnification agreement to refer generically to such provisions.

plan's assets frequently contain provisions that may raise issues under section 406(a)(1)(B) of the Act as well as section 4975(c)(1)(B) of the Code, both of which prohibit the lending of money or other extensions of credit between a plan and a party in interest or disqualified person. These practitioners state that account opening agreements, described below, contain standard ''cross-collateralization'' provisions which permit a broker or other financial institution (hereinafter, unless otherwise noted, a financial institution) to transfer assets between multiple accounts that an individual has established with the financial institution in order to cover investment-related losses or costs attributable to one such account. For example, where an IRA Owner opens an IRA and a personal investment account with a financial institution, and executes with the financial institution an account opening agreement that has a cross-collateralization provision covering both accounts, the financial institution would be authorized, pursuant to the cross-collateralization provision, to, thereafter, either: Transfer assets from the IRA Owner's personal investment account to the IRA to cover certain losses or costs or expenses attributable to the IRA; or transfer assets from the IRA to the IRA Owner's personal investment account to cover certain losses or costs or expenses attributable to the personal investment account. The Department understands the mechanics of the former arrangement to operate as follows: if an expense attributable to an IRA is debited to that account, and the amount of such debit exceeds the amount of assets held in the account, a cross-collateralization provision permits a financial institution to debit the IRA Owner's personal investment account for that expense, and make a corresponding credit of the same amount to the IRA account.

The practitioners expressed concern that, consistent with Advisory Opinion 2009–03A, a cross-collateralization provision that constitutes a grant to a financial institution of a security interest in an IRA Owner's non-IRA accounts with the financial institution in order to cover indebtedness of the IRA, may be an impermissible ''extension of credit'' under section 4975(c)(1)(B) of the Code. The practitioners expressed further concern that, consistent with Advisory Opinion 2011–09A, such impermissible ''extension of credit'' may not be within the scope of relief provided by PTE 80–26.

On December 12, 2011, the Internal Revenue Service (the IRS) issued Announcement 2011–81. The Announcement provides temporary relief with respect to IRAs in circumstances in which the IRA Owners have signed certain indemnification agreements or granted certain security interests that may have an effect on their IRAs. Specifically, in the Announcement the IRS states that ''[p]ending further action by the [Department] and until issuance of further guidance from the IRS superseding [the Announcement], the IRS will determine the tax consequences relating to an IRA without taking into account the consequences that might otherwise result from a prohibited transaction under section 4975 due to entering into any indemnification agreement or any cross-collateralization agreement similar to the agreements described in [the Department's] Advisory Opinions 2009–03A and 2011–09A, provided there has been no execution or other enforcement pursuant to the agreement against the assets of an IRA of the individual granting the security interest or entering into the cross-collateralization agreement.''

D. Request for Exemptive Relief by SIFMA

The Securities Industry and Financial Markets Association (SIFMA) submitted a letter to the Department dated December 12, 2011. In the letter, SIFMA states that, prior to Advisory Opinion 2009–03, most practitioners believed that indemnification agreements and other grants of security interests such as those described in Advisory Opinions 2009–03A and 2011–09A, if never called upon, did not violate the prohibited transaction provisions of ERISA or the Code. According to SIFMA, most practitioners believed further that even if these indemnification agreements were seen as prohibited transactions, PTE 80–26 extended exemptive relief to such transactions. SIFMA indicated that indemnification agreements were commonly used in futures, brokerage, options and other similar agreements.

In the December 12, 2011 letter, SIFMA states also that Code section 408(e)(2)(A) provides that if an individual who is an IRA Owner engages in any transaction with his or her IRA that is prohibited by Code section 4975, the IRA is treated as if it were distributed (and thus loses its tax-qualified status) as of the first day of the year in which the transaction took place. SIFMA expresses concern that after Advisory Opinion 2009–03A, the practical impact of Advisory Opinion 2011–09A is that, absent immediate relief, millions of IRA Owners may be concerned that their accounts could be disqualified and subject to taxation as of the date they entered into the indemnification agreement.

Likewise, according to SIFMA, relief is necessary for plans other than IRAs because of the Department's conclusion that an indemnification agreement, uncalled upon, violates section 4975(c)(1)(B) of the Code. Since the wording of section 406(a)(1)(B) of the Act contains nearly identical language, SIFMA expressed concern that standard indemnification agreements entered into with other types of plans may, in the Department's view, violate that section of the Act as well. In SIFMA's view, retroactive relief would eliminate concerns about potentially incorrect past Form 5500 filings, and eliminate questions from auditors with respect to past related party transactions.

SIFMA subsequently submitted an application for a class exemption or amendment to PTE 80–26. Therein, SIFMA states that brokerage, futures and other investment agreements (''Account Opening Agreements'') typically contain language requiring all ''related accounts'' to indemnify the service provider against debits in an account, regardless of whether those debits are caused by unpaid fees, unpaid taxes, unpaid third-party fees, or trading losses. According to SIFMA, indemnification language contained in Account Opening Agreements is not uniform, and the term ''related accounts'' may not be defined with specificity.

SIFMA provided several examples regarding the mechanics of an indemnification agreement. SIFMA describes a scenario, for instance, in which an IRA has an Account Opening Agreement with a broker-dealer which provides that if a debit arises in the IRA account that remains unpaid after demand, the IRA owner, who also has a personal account at the broker-dealer, guarantees the payment of the debit from that personal account. If, for example, the IRA account directs that a security be sold but fails to deliver the security for settlement, and there are costs to cancel the trade, there will be a debit to the IRA that could be charged to the IRA owner's personal account if insufficient funds exist in the IRA account. SIFMA also noted that indemnification agreements can involve situations in which funds are available in a plan account but would result in adverse consequences if they were used to pay the indebtedness. An IRA that owns a private fund interest that is not immediately liquid, but needs to pay an accountant to prepare a UBIT return is an example. The accountant's fee causes a debit in the IRA account that cannot be satisfied without liquidating the private fund interest under unfavorable terms. Consequently, pursuant to the indemnification agreement, the debit may be charged to the IRA owner's personal account. Each of these examples could apply to a plan sponsor who establishes the plan's account and maintains a corporate account with the same financial institution.

SIFMA requests three categories of exemptive relief for IRAs and other plans. First, SIFMA requests a retroactive exemption, effective January 1, 1975, for indemnification agreements, as described herein, in favor of a financial institution entered into by an IRA or any other plan, regardless of whether the indemnification agreement has been called upon, executed or enforced.

Second, SIFMA requests a temporary exemption that would provide relief for such indemnification agreements until a date that is 12 months after final relief is issued. According to SIFMA, this temporary relief, if granted, would provide banks and nonbank custodians, brokers, futures commission merchants and other financial institutions the time necessary to determine how to amend their account documents to either eliminate the indemnification agreements or to revise the provisions in a way that will be compliant with the Department's position.

Third, SIFMA requests a prospective exemption to explicitly permit plan sponsors, the self-employed, and IRA Owners to indemnify their IRAs and other plans so that these entities may continue to engage in short sales, margin transactions, options and futures.

E. Scope and Purpose of the Proposed Amendment

As described in further detail below, this proposed amendment, if adopted, would provide retroactive and temporary relief, as requested by SIFMA. Such relief would be provided for a ''Covered Extension of Credit.'' The exemption defines this term as an indemnification agreement, cross-collateralization agreement or other grant of a security interest in favor of a financial institution, as set forth in an Account Opening Agreement between a plan and the financial institution, by which (1) assets in a Plan Account guarantee the payment of amounts debited to a Related Account, or (2) assets in a Related Account guarantee the payment of amounts debited to a Plan Account. The term Covered Extension of Credit does not include a loan or payment under such agreement or security interest. A Plan Account is an account established with a financial institution by an employee benefit plan as defined in section 3(3) of ERISA or a plan as defined in section 4975(e)(1) of the Code. A Related Account is an account established pursuant 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.

Retroactive and temporary relief is additionally proposed for the lending of money (a Covered Loan) by a Related Account to a Plan Account, pursuant to a Covered Extension of Credit, if the Related Account is not itself a Plan Account. Thus, although exemptive relief is being proposed herein for a *Covered Extension of Credit* between a Plan Account and a Related Account, where such Related Account may itself be a Plan Account, exemptive relief for a *Covered Loan* would not apply to loans from Plan Accounts. Finally, the retroactive and temporary relief extends to the repayment by a Plan Account to a Related Account of a Covered Loan (Covered Repayment).

The Department is proposing the relief described above solely to enable financial institutions to remove Covered Extensions of Credit from Account Opening Agreements and conclude any outstanding Covered Loans that may exist. The Department believes that broad retroactive and temporary exemptive relief for Covered Extension of Credit arrangements is appropriate due to apparently widespread misunderstanding as to the application of the prohibited transaction provisions and PTE 80–26 to the subject transactions. The Department is of the view that, due to practitioners' good faith belief in their compliance with the prohibited transaction and class exemption provisions as applied to these transactions, it is appropriate to propose exemptive relief that, if adopted, would enable an IRA to maintain its status under the Code, notwithstanding that the IRA has been subject to a Covered Extension of Credit arrangement. Similarly, the Department believes that it is appropriate to propose relief that would enable a plan fiduciary to avoid the costs and uncertainties that may otherwise have arisen from the plan's participation in a Covered Extension of Credit arrangement. The Department has also included retroactive relief from section 406(b)(1) of ERISA and section 4975(c)(1)(E) of the Code to cover the situation in which a plan fiduciary entered into an indemnification agreement which would have permitted payment of debits by a Plan Account to a Related Account maintained by such plan fiduciary.[8]

The Department is not proposing permanent prospective exemptive relief herein for Covered Extensions of Credit (and loans and loan repayments resulting therefrom), as requested by SIFMA. In this regard, SIFMA has not proposed conditions that would address the proper oversight, monitoring, and reporting of a Covered Loan or a Covered Repayment, or that would otherwise support a finding that Covered Extension of Credit arrangements are protective of affected IRAs or other plans. The Department notes, however, that future exemptive relief may be available to the extent all of the requisite findings under section 408(a) of ERISA can be made.

F. Description of the Proposed Amendment

The proposed amendment, if adopted, would add a new section to PTE 80–26, entitled *Section V. Temporary Exemption,* and would also re-designate the *Definitions* section of PTE 80–26 as *Section VI. Definitions.* The proposed amendment does not otherwise affect the relief set forth in section IV of the existing class exemption.

As proposed, section V would contain relief from ERISA sections 406(a)(1)(B) and (D) and 406(b)(1) and (b)(2), as well as Code sections 4975(a) and (b), by reason of section 4975(c)(1)(B), (D) and (E), for: (1) A Covered Extension of Credit; (2) a Covered Loan to a Plan Account that is made in connection with a Covered Extension of Credit; and (3) a Covered Repayment. The terms Covered Extension of Credit, Covered Loan, Plan Account, Covered Repayment, Related Account and Account Opening Agreement are defined in section VI of the proposed amendment, and are also described below.

If adopted as proposed, the relief contained in section V would extend from January 1, 1975, until the date that is six months after the date a final amendment is adopted in the **Federal Register**. The Department believes that six months prospective relief provides financial institutions ample time to remove Covered Extensions of Credit

[8] The Department notes however, that a sponsor of a plan subject to Title I of ERISA who entered into an account opening agreement permitting indemnification by the plan of the sponsor's corporate accounts, where such plan sponsor actually maintained a corporate account with the same financial institution, may have engaged in a violation of section 404 of ERISA. Class exemptions, including the one proposed herein, if granted, do not provide relief for fiduciaries with respect to the fiduciary responsibility provisions of section 404.

from clients' Account Opening Agreements, particularly in light of the fact that financial institutions were put on notice of the Department's views on these indemnification agreements in 2011.

The transactions described in section V of this proposed amendment are subject to several of the existing conditions applicable to loans and extensions of credit described in section IV (b)(1) or (b)(2) of PTE 80–26. Section V provides that, in connection with a Covered Extension of Credit, Covered Loan or Covered Repayment: no interest or other fee may be charged to the IRA or plan; no discount for payment in cash is relinquished by the IRA or any other plan; and no Covered Loan is made by an IRA or any other plan. As noted previously, exemptive relief is being proposed herein for a Covered Loan only to the extent that, among other things, the Covered Loan is made to a Plan Account by a non-plan Related Account. Section V provides also that a Covered Loan may not be the type of loan described in section 408(b)(3) of ERISA and the regulations promulgated thereunder (29 CFR 2550.408b–3) or section 4975(d)(3) of the Code and the regulations promulgated thereunder (26 CFR 54.4975–7(b)).

The Department is proposing several additional conditions that would be applicable to the covered transactions. In this regard, section V of the proposed amendment requires that a Covered Extension of Credit be set forth in a written brokerage, futures and other investment agreement (*i.e.,* an Account Opening Agreement) between an IRA or any other plan and a financial institution, and that such financial institution be subject to oversight by a regulatory agency or a self-regulatory organization. The Department believes that such oversight is necessary given the lack of independent safeguards associated with Covered Extensions of Credit, as such arrangements are understood by the Department.

The Department believes also that a Covered Loan from a Related Account to a Plan Account should arise from an account debit to the Plan Account that is lawful under relevant federal laws, rules and regulations. Accordingly, section V requires that any Covered Loan by a Related Account to a Plan Account must result from a lawful Plan Account-incurred cost (including a fee, expense, investment loss, or tax). To ensure that the proposed amendment is administratively feasible, section V requires that, for purposes of the proposed amendment, the amount of a Covered Loan from a Related Account to a Plan Account shall be no greater than the amount of the cost, fee, expense, loss or tax incurred by the Plan Account (which must be, as noted above, a lawful cost under applicable law, rules and regulations) for which the Covered Loan is being made. The amount of any Covered Repayment of a Covered Loan by a Plan Account to a Related Account must be no greater than the original Covered Loan amount. Accordingly, where, for example, a Plan Account has incurred a $50 expense that meets the terms of the proposed amendment, the Covered Loan amount by a Related Account to the Plan Account must be no greater than $50, and any Covered Repayment by the Plan Account to the Related Account must also not exceed $50.

Section VI of the proposed amendment adds six defined terms to that section. The term Covered Extension of Credit is defined to mean an indemnification agreement, cross-collateralization agreement or other grant of a security interest in favor of a financial institution, as set forth in an Account Opening Agreement between a plan and the financial institution, which guarantees the payment of debits to (or by) a Plan Account by (or to) a Related Account. The Department notes that this definition is intended to provide broad relief for Plan Accounts that have been subject to a Covered Extension of Credit, and that remain subject to a Covered Extension of Credit until six months following the date on which this proposed amendment is adopted. The scope of the term Covered Loan is narrower. This term is defined in section VI to mean the lending of money by a Related Account to a Plan Account, including by means of a debit to the Related Account and a corresponding credit to the Plan Account, where the Covered Loan is made pursuant to a Covered Extension of Credit. As such, the term Covered Loan does not include a loan by a Plan Account to a Related Account, notwithstanding that such loan may be authorized by an Account Opening Agreement. A Covered Repayment is defined to mean a repayment by a Plan Account to a Related Account of a Covered Loan. A Plan Account is defined to mean an account established with a financial institution by an employee benefit plan as defined in section 3(3) of ERISA or a plan as defined in section 4975(e)(1) of the Code. The term Related Account is defined in section VI to mean 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. Finally, the term Account Opening Agreement is defined as a written brokerage, futures or other investment agreement.

G. Additional Proposed Amendments on the Department's Own Motion

As noted above, PTE 80–26 was most recently amended effective December 15, 2004. Therein, the Department eliminated a previous requirement of the exemption that the proceeds of certain loans or extensions of credit be used only for a period of no more than three business days. The Department also added two new conditions, conditions IV(e) and (f). Condition IV(e) provides that: ''[t]he loan is not described in section 408(b)(3) of ERISA and the regulations promulgated thereunder (29 CFR 2550.408b–3) or section 4975(d)(3) of the Code and the regulations promulgated thereunder (26 CFR 54.4975–7(b))[.]''

To clarify that this condition applies equally to extensions of credit, the Department is proposing to amend condition IV(e) as follows:

> ''[t]he loan or other extension of credit is not described in section 408(b)(3) of ERISA and the regulations promulgated thereunder (29 CFR 2550.408b–3) or section 4975(d)(3) of the Code and the regulations promulgated thereunder (26 CFR 54.4975–7(b))[.]''

Additionally, for consistency, the Department is proposing to replace the phrase ''loan or extension of credit,'' wherever it is used in sections of PTE 80–26 that have not expired, with the phrase ''loan or other extension of credit.''

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary, or other party in interest or disqualified person with respect to a plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA which require, among other things, that a fiduciary act prudently and discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the

employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption does not currently extend to transactions prohibited under section 406(b)(1) and (3) of the Act or section 4975(c)(1)(E) or (F) of the Code. If granted, the proposed amendment would provide limited relief to certain transactions prohibited under section 406(b)(1) of the Act and section 4975(c)(1)(E) of the Code;

(3) Before an exemption may be granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(4) If granted, the proposed amendment is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(5) The proposed amendment, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Written Comments and Hearing Request

The Department invites all interested persons to submit written comments or requests for a public hearing on the proposed amendment to the address and within the time period set forth above. All comments received will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection at the above address.

Proposed Amendment

Under section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR 2570, Subpart B (76 FR 66637, 66644, October 27, 2011), the Department proposes to amend PTE 80–26 as set forth below:

Section I. Retroactive General Exemption

Effective January 1, 1975 until December 14, 2004 the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(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) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) 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 loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only—

(1) for the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or

(2) for a period of no more than three business days, for a purpose incidental to the ordinary operation of the plan;

(c) The loan or extension of credit is unsecured; and

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan.

Section II: Temporary Exemption

Effective November 1, 1999 through December 31, 2000, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(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) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) 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 loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only for a purpose incidental to the ordinary operation of the plan which arises in connection with the plan's inability to liquidate, or otherwise access its assets or access data as a result of a Y2K problem.

(c) The loan or extension of credit is unsecured;

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan; and

(e) The loan or extension of credit begins on or after November 1, 1999 and is repaid or terminated no later than December 31, 2000.

Section III. September 11, 2001 Market Disruption Exemption

Effective September 11, 2001 through January 9, 2002, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(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) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) 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 loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only for a purpose incidental to the ordinary operation of the plan which arises in connection with difficulties encountered by the plan in liquidating, or otherwise accessing its assets, or accessing its data in a timely manner as a direct or indirect result of the September 11, 2001 disruption;

(c) The loan or extension of credit is unsecured;

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan; and

(e) The loan or extension of credit begins on or after September 11, 2001, and is repaid or terminated no later than January 9, 2002.

Section IV. Prospective General Exemption

Effective as of December 15, 2004, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(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) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) 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 loan or other extension of credit;

(b) The proceeds of the loan or other extension of credit are used only—

(1) for the payment of ordinary operating expenses of the plan, including the payment of benefits in

accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or

(2) for a purpose incidental to the ordinary operation of the plan;

(c) The loan or other extension of credit is unsecured;

(d) The loan or other extension of credit is not directly or indirectly made by an employee benefit plan;

(e) The loan or other extension of credit is not described in section 408(b)(3) of ERISA and the regulations promulgated thereunder (29 CFR 2550.408b–3) or section 4975(d)(3) of the Code and the regulations promulgated thereunder (26 CFR 54.4975–7(b)); and

(f)(1) Any loan described in section IV(b)(1) that is entered into on or after April 7, 2006 and that has a term of 60 days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan;

(2) Any loan described in (b)(2) of this paragraph that is entered into for a term of 60 days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan.

Section V: Temporary Exemption

The restrictions of section 406(a)(1)(B) and (D) and section 406(b)(1) and (b)(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, from January 1, 1975, until the date that is six months following the date a final amendment is published in the **Federal Register**, 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:

(a) 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;

(b) The Covered Extension of Credit is set forth in an Account Opening Agreement between a plan and a financial institution, where the financial institution is subject to oversight by a regulatory agency or a self-regulatory organization;

(c) The Covered Loan is not directly or indirectly made by a plan;

(d) The Covered Extension of Credit and the Covered Loan are not described in section 408(b)(3) of ERISA and the regulations promulgated thereunder (29 CFR 2550.408b–3) or section 4975(d)(3) of the Code and the regulations promulgated thereunder (26 CFR 54.4975–7(b));

(e) The Covered Loan arose from a lawful cost (including a fee, expense, investment loss or tax); and

(f) The amount of a Covered Loan from a Related Account to a Plan Account is no greater than and relates to an amount debited to the Plan Account in connection with an expense described in paragraph (e) of this section. The amount of a Covered Repayment of a Covered Loan must not be greater than the original Covered Loan amount.

Section VI. Definitions

(a) For purposes of section II, a ''Y2K problem'' is a disruption of computer operations resulting from a computer system's inability to process data because such system recognizes years only by the last two digits, causing a ''00'' entry to be read as the year ''1900'' rather than the year ''2000.''

(b) For purposes of section III, the ''September 11, 2001 disruption'' is the disruption to the United States financial and securities markets and/or the operation of persons providing administrative services to employee benefit plans, resulting from the acts of terrorism that occurred on September 11, 2001;

(c) For purposes of this exemption, the terms ''employee benefit plan'' and ''plan'' refer to an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code;

(d) For purposes of section V, the term ''Plan Account'' means an account established with a financial institution by an employee benefit plan described in section 3(3) of ERISA or a plan described in section 4975(e)(1) of the Code.

(e) For purposes of section V, the term ''Covered Extension of Credit'' means an indemnification agreement, cross-collateralization agreement or other grant of a security interest in favor of a financial institution, as set forth in an Account Opening Agreement between a plan and the financial institution, which guarantees the payment of debits to (or by) a Plan Account by (or to) a Related Account, but does not include a loan or payment under such agreement or security interest;

(f) For purposes of section V, the term ''Covered Loan'' means 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;

(g) For purposes of section V, the term ''Covered Repayment'' means the repayment by a Plan Account to a Related Account of a Covered Loan.

(h) For purposes of section V, the term ''Related Account'' means 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.

(i) For purposes of section V, the term ''Account Opening Agreement'' means a written brokerage, futures or other investment agreement.

Signed at Washington, DC, this 20th day of May, 2013.

Lyssa E. Hall,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U. S. Department of Labor.

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,253]

Sears Holdings Management Corporation, A Division Of Sears Holdings Corporation, Hoffman Estates, Illinois; Notice of Negative Determination on Reconsideration

On August 3, 2012, the Department of Labor issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of Sears Holdings Management Corporation, Hoffman Estates, Illinois (subject firm). The Department's Notice of determination was published in the **Federal Register** on August 14, 2012 (77 FR 48550).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

During the initial investigation, the Department received information that the petitioners worked in different units of the subject firm: one petitioner worked in the marketing unit, another