



October 27, 2009

Mr. Timothy Berry
1812 E. Toledo
Gilbert, AZ 85295

2009-03A
IRC Sec.
4975(c) (1)

Dear Mr. Berry:

This is in response to your request for an advisory opinion from the U.S. Department of Labor (Department) concerning the application of the prohibited transaction provisions under section 4975(c) of the Internal Revenue Code of 1986, as amended (Code),¹ to certain transactions or arrangements involving an individual retirement account (IRA). Specifically, you ask whether it would be a prohibited transaction in violation of Code section 4975(c)(1)(B) for an IRA owner to grant to a brokerage firm (Broker) a security interest in the assets of his non-IRA accounts held by the Broker as a requirement for establishing an IRA with the Broker.

You make the following representations in support of your request. Your client currently has a personal brokerage account at the Broker. He now wishes to open an IRA with the Broker, and will self-direct investments made with the IRA's assets. In connection with the establishment of the IRA, the Broker has asked your client to agree to the following clause:

All securities and other property now or hereafter held, carried or maintained by us in our possession or control, for any purpose, in or for the benefit of any of your Accounts, now or hereafter opened, including any Account in which you may have an interest, shall be subject to a continuing first lien and first priority perfected security interest in favor of us for the discharge of all indebtedness and your obligations to us, and are to be held by us as security for the payment of any liability or indebtedness of yours to us in any of your accounts.

You authorize us the right to transfer securities and other property so held by us from or to any other of your Accounts held by us, whenever, in our judgment, we consider such transfer necessary for our protection... .

You state that this language requires your client to pledge his personal assets, as handled in certain accounts maintained by the Broker, to cover indebtedness that the

¹ Under Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code was transferred, with certain exceptions not here relevant, to the Secretary of Labor. The Secretary of the Treasury is bound by the interpretation of the Secretary of Labor pursuant to such authority.

IRA may incur. You express concern that prohibited transactions would occur if your client establishes the IRA with the Broker pursuant to such terms.

It is the opinion of the Department that the grant by an IRA owner to the Broker of a security interest in his non-IRA accounts in order to cover indebtedness of, or arising from, his IRA, as you describe, would be a prohibited transaction under Code section 4975(c)(1)(B).

Code section 4975 sets forth a series of "prohibited transactions" involving a plan and a "disqualified person." Section 4975(e)(1), in pertinent part, defines the term "plan" to include an IRA, described in section 408(a) of the Code. Section 4975(e)(2) defines "disqualified person," in relevant part, to include a fiduciary of the plan. Section 4975(e)(3) defines the term "fiduciary," in part, to include any person who exercises discretionary authority or control respecting management of such plan or exercises any authority or control regarding management or disposition of plan assets.

Thus, your client, as an IRA owner who would self-direct the investments made by his IRA, would be a fiduciary and a disqualified person with respect to the IRA under Code section 4975(e)(2) and would be subject to the restrictions imposed by section 4975(c)(1).²

Section 4975(c)(1)(B) prohibits the direct or indirect lending of money or other extension of credit between a plan and a disqualified person. The granting of a security interest in the IRA owner's personal accounts to cover indebtedness of, or arising from, the IRA constitutes such an extension of credit.

Congress stated in the ERISA Conference Report that, "...a prohibited transaction generally will occur if a loan to a plan is guaranteed by a party-in-interest [disqualified person], unless it comes within the special exemption for employee stock ownership plans." H.R. Rep. No. 1280, 93d Cong., 2d Sess., at 308 (1974). Consequently, a guarantee of a plan's indebtedness by a fiduciary or other disqualified person is an extension of credit to the plan in violation of section 4975(c)(1)(B) of the Code.³

Here, the requested granting of a security interest in the assets of the IRA owner's personal accounts to the Broker to cover the IRA's debts to the Broker is akin to a guarantee of such debts by the IRA owner. This would amount to an extension of credit from the IRA owner to the IRA. Thus, section 4975(c)(1)(B) prohibits the granting of such a security interest to the Broker.

Your request was limited to the question of whether the Code prohibits an IRA owner's grant of a security interest in his non-IRA accounts in order to cover the IRA's debts.

² See, e.g., Advisory Opinions 2006-01A (Jan. 6, 2006) and 2006-09A (Dec. 19, 2006).

³ See Advisory Opinion 90-23A (Jul. 3, 1990).

Nevertheless, the Department notes that to the extent that the situation you describe also would result in the granting by the IRA owner to the Broker of a security interest in the IRA's assets to cover the indebtedness of the IRA owner, prohibited transactions would likewise occur in violation of Code sections 4975(c)(1)(B), (D), & (E) for the following reasons:

First, granting such a security interest in the IRA's assets would amount to an extension of credit by the IRA to the IRA owner, a fiduciary and a disqualified person, and cause a violation of section 4975(c)(1)(B). Second, section 4975(c)(1)(D) prohibits the transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan. Thus, in granting the requested security interest in the IRA's assets, the IRA owner would be transferring or using the IRA's assets for his own benefit in violation of section 4975(c)(1)(D). Last, section 4975(c)(1)(E) prohibits a disqualified person who is a fiduciary from dealing with the income or assets of a plan in his own interest or for his own account. The IRA owner as a disqualified person would be using the IRA's assets "in his own interest or for his own account" in violation of section 4975(c)(1)(E).

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations