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SUPPLEMENTARY INFORMATION: On March 29, 1988, the Department of Labor (the Department) published in the *Federal Register* (53 FR 10169) a proposed class exemption from certain taxes imposed by section 4975(a) and (b) of the Code by reason of certain transactions described in section 4975(c)(1)(A), (B) and (D) of the Code.

The exemption was requested in an application dated March 4, 1987, on behalf of Prudential Bache Securities Inc., (Pru-Bache). The application was filed pursuant to section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

The notice of pendency gave interested persons an opportunity to comment on the proposal. Public comments were received pursuant to the provisions of section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1.

Information collection requirements contained in PTE 91-55 have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB number 1210-0079 approved for use through July 31, 1994.

Discussion of Comments Received

The applicant, Pru-Bache, and Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill), each of which functions as a broker-dealer in Coins, and as a custodian for IRAs, commented on and expressed general support for the exemption.

(A) Scope

Each commentator urged that the exemption include transactions involving certain IRAs subject to title I of the Employee Retirement Income Security Act of 1974 (ERISA).¹ The commentators suggested that, if the scope of the exemption were to be limited, the limitation should not be based on whether a title I or title II IRA is involved but rather on whether the transactions are directed by the IRA depositor. In particular, the applicant believes that such a limitation would totally avoid the application of the prohibited transaction restrictions of

title I since no sponsoring employer or fiduciary of an "employee benefit plan" will have any fiduciary responsibility for the depositor's exercise of investment control over the IRA assets. The Department notes that, in the case of a participant who exercises control over the assets of his account in the manner described in section 404(c) of ERISA with respect to an investment, the participant would not be considered a fiduciary by reason of his exercise of control and other plan fiduciaries are relieved of liability under part 4 of title I of ERISA for the results of the participant's or beneficiary's exercise of control.²

The Department notes that section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. However, the authority to grant administrative exemptions with respect to transactions that are exempted by subsection 404(c) of ERISA from the provisions of part 4 of subtitle B of title I of ERISA remains with the Treasury Department pursuant to the Reorganization Plan.³ Accordingly, the Department solicited the views of the Internal Revenue Service (the Service) regarding the adoption of a final class exemption that would extend to ERISA section 404(c) transactions.

The Service fully reviewed the Department's pendency notice prior to its publication in the *Federal Register*, and has subsequently reviewed the entire exemption application file, including comments received as a result of the pendency notice, and concurs in the relief provided by the exemption. Accordingly, the Service has determined that it will join the Department in granting this exemption. Although the Service was not a signatory to the notice

² Section 404(c) refers to a pension plan that "provides for individual accounts." On March 13, 1991 (56 FR 10724), the Department repropoed a regulation under section 404(c) which defined an "ERISA section 404(c) plan" as an individual account plan described in section 3(34) of ERISA that permits a participant to make an independent choice, from a broad range of investment alternatives, regarding the manner in which any portion of the assets in his individual account is invested. The proposed regulation, however, limited coverage of section 404(c) to "individual account plans" described in section 3(34) of ERISA because the Conference Report accompanying ERISA, H.R. Rep. No. 1280, 93d Cong., 2d Sess., 305 (1974), refers to individual account plans that provide for participant control, and section 404(c) contemplates separate individual accounting so that each participant will bear the *sole* risk of loss attributable to his investment decision.

³ See section 102(a)(iii) of Reorganization Plan No. 4 of 1978.

Pension and Welfare Benefits Administration

Department of the Treasury

Internal Revenue Service

[Prohibited Transaction Exemption 91-55; Application No. D-7088]

Transactions Between Individual Retirement Accounts and Authorized Purchasers of American Eagle Coins

AGENCY: Pension and Welfare Benefits Administration, Labor; Internal Revenue Service.

ACTION: Grant of class exemption.

SUMMARY: This document contains a final class exemption from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption permits purchases and sales by certain "individual retirement accounts," as defined in Code section 408 ("IRAs"), of American Eagle bullion coins ("Coins") in principal transactions from or to broker-dealers in Coins which are "authorized purchasers" of Coins in bulk quantities from the United States Mint (the "Mint") and which are also "disqualified persons," within the meaning of Code section 4975(e)(2), with respect to the IRAs. The exemption would also permit the interest-free extension of credit in connection with such purchases and sales. The exemption affects persons with an interest in the investments of IRAs, including IRA depositors and their beneficiaries, as well as persons who provide custodial services to IRAs.

EFFECTIVE DATE: January 1, 1987.

FOR FURTHER INFORMATION CONTACT: Kay Madsen, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, (202) 523-8971

¹ The proposed exemption did not extend relief to transactions involving IRAs which are employee benefit plans covered by title I of ERISA. See 29 CFR 2510.3-2(d).

of pendency for this exemption, it finds that it is unnecessary to publish a separate notice because: the procedures followed by the Department provided an adequate opportunity for full consideration of the issues in the proposed exemption; the issues involved in an exemption for transactions involving the purchase and sale of Coins which are afforded the statutory relief described in section 404(c) of ERISA are substantially the same as those in the proposed exemption; and its decision would not have been enhanced or assisted by the receipt of additional comments. Therefore, substantive rights will not be jeopardized if a separate notice of pendency is not issued.

(B) Dual Arm's-Length Pricing Standards

Both commentators urged the Department to delete the "general" arm's-length test which would require that the terms of a transaction be not less favorable to the IRA than the terms generally available in comparable Coin transactions between unrelated parties. In the view of the commentators, the "general" arm's-length standard would necessitate consideration of any numismatic value.

In this regard, the application stated that all Coins of a given size will be priced by an authorized purchaser at the same price at any given point in time. Pru-Bache indicated that its operational system with respect to its Coin program is such that Coins are priced in all transactions with IRAs and others without regard to numismatic value. The applicant believes that this is the situation for the other "authorized purchaser" IRA custodians as well. Pru-Bache concluded by indicating that an IRA desiring to engage in Coin transactions reflecting numismatic value could do so through other custodians whose systems permit such transactions. Merrill similarly indicated that, except in rare circumstances, it buys and sells Coins at prices reflecting the value of the metal content. The commentators suggest that the "particular" arm's-length test which requires that the terms of a covered transaction must be not less favorable to the IRA than the terms afforded by the disqualified person or any affiliate in comparable Coin transactions involving unrelated parties would provide sufficient protection.

The commentators further indicated that it would be very difficult to maintain records which would permit a determination of whether the "general" arm's-length standard described in section III(d)(i) of the proposal had been met.

After considering the comments, the Agencies have determined that the safeguards contained in the exemption would not be significantly diminished by deleting the "general" arm's-length test contained in section III(d)(i).⁴ However, in view of the decision to delete the "general" arm's-length test, the Agencies believe that purchases and sales of Coins between the authorized purchaser and non-IRA customers provide an important safeguard under the exemption. Accordingly, section III(d) has been clarified to provide that each denomination of Coins offered to IRAs must be purchased and sold by the authorized purchaser in transactions with unrelated parties in the ordinary course of its business with customers other than IRAs.

Merrill also expressed concern that the requirement under section III(d) (i) and (ii) that the comparable Coin transactions involve unrelated parties could be read to require comparison with transactions between an authorized purchaser and another bullion dealer. The Agencies are of the view that transactions between bullion dealers are not comparable to transactions between an authorized purchaser and retail customer such as an IRA. Therefore, no modification of the exemption is necessary.

Finally, Merrill suggests that the phrase "terms of the transaction" contained in section III(d) be deleted and replaced by the phrase "price quotations for Coins." The commentator expressed concern that the phrase "terms of the transaction" was too broad and might be construed to include related fees, such as storage/custodial or transaction fees rather than just the actual price of the Coins. The Agencies are not persuaded that the modification suggested by the commentator would be as protective of the interests of participants and beneficiaries of IRAs engaging in Coin transactions. Consequently, the exemption has not been revised in this regard. The exemption as granted relates to the purchase and sale of the Coins (as well as an extension of credit) and the Department intends that all the terms related to that transaction be subject to the conditions of the exemption. To the extent services are rendered to a plan which are beyond the scope of this exemption, the fees for those services

⁴ However, it should be noted that, if an authorized purchaser engages in Coin transactions which reflect a premium relative to other Coins of the same denomination, the Agencies are of the view that section III(e) of the exemption would require that IRAs also be afforded the opportunity to engage in such transactions and to receive any numismatic premium attributable to Coins sold.

would need to meet the conditions of section 4975(d)(2) of the Code in order to qualify for the relief provided in that section.

Recordkeeping Requirements

Each commentator expressed concern regarding the condition contained in section III(i) of the proposal which requires that the person directing the investments of the IRA have access to such records as are necessary to determine whether the conditions of the exemption have been met. The commentators stated that, while information concerning trade secrets or financial information would not have to be made available under the proposal to the person directing the investments of the IRA, the condition could be interpreted to require an authorized purchaser to reveal the names of clients. The commentators suggest that the availability of summary information with respect to the identity of other clients (e.g., whether a party is an IRA) would provide sufficient protection.

As the commentators noted, section III(i) permits an authorized purchaser to withhold trade secrets or financial information which is privileged or confidential from persons directing the investment of the IRA. The Agencies believe that this condition does not require the disclosure of the specific names of customers or other identifying information so long as the records disclose the type of customers with whom a transaction in Coins was consummated. Therefore, no modification is necessary.

Prior Disclosure

Merrill expressed concern regarding the prospective condition in the proposal which would require an authorized purchaser to furnish certain material information regarding Coin transactions to the person directing investments of the IRA prior to engaging in covered transactions. The commentator states that such a requirement would be burdensome, and suggests as an alternative that the exemption require that the disclosure precede or accompany the written confirmation of an authorized purchaser's first covered Coin transaction with an IRA.

The Agencies believe that it is entirely appropriate, in the context of this class exemption, to require the disclosure of certain information to the person directing the investments of the IRA prior to its engaging in covered transactions. It appears to the Agencies that such information would be helpful to the directing person generally in the

evaluation of the merits of Coins as an investment. Accordingly, the Agencies have retained this condition in the final exemption.

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 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of ERISA or the Code. These provisions include 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 discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan; nor does the exemption affect the requirement of section 408(a) of the Code that an IRA must operate for the exclusive benefit of the individual for whose benefit the IRA is maintained and his or her beneficiaries.

(2) In accordance with section 4975(c)(2) of the Code, the Agencies make the following determinations:

(i) The exemption is administratively feasible;

(ii) The exemption is in the interest of IRAs and of the individuals for whose benefit the IRAs are maintained; and

(iii) The exemption is protective of the rights of individuals for whose benefit the IRAs are maintained.

(3) The exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The exemption is 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.

Exemption

Accordingly, the following exemption is granted under the authority of section 4975(c)(2) of the Code, pursuant to ERISA Procedure 75-1 and Revenue Procedure 75-28, 1975-1 C.B. 772:

Section I: Definitions and Special Rules

The following definitions apply to this exemption:

(a) "Authorized purchasers" are banks or other persons referenced in

section 408(a)(2) or (h) of the Internal Revenue Code of 1986 (Code) that are approved by the United States Mint (the Mint), for eligibility to purchase the American Eagle U.S. gold or silver bullion coins which are described in section 5112(a) (7), (8), (9), and (10) or section (e) of Title 31 of the United States Code (Coins), directly from the Mint in bulk quantities.

(b) The term "covered transaction" means a transaction described in section II of this exemption.

(c) "IRA" means an individual retirement account described in Code section 408 with respect to which the authorized purchaser is a disqualified person.

(d) An "affiliate" of a person includes the following:

(1) Any person directly or indirectly controlling, controlled by, or under common control with, the person;

(2) Any officer, director, partner, employee, member of the family (as defined in Code section 4975(e)(6)), brother, sister, or spouse of a brother or sister, of the person;

(3) Any corporation or partnership of which the person is an officer, director or partner.

The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(e) The term "execution" means the acceptance of an offer to purchase or sell a Coin in a covered transaction such that both the IRA and the authorized purchaser are legally obligated to complete the transaction as directed.

(f) The term "accredited person" means any duly authorized employee of the Department of Labor or the Internal Revenue Service or the person directing the investments of an IRA.

(g) The term "independent third party" excludes the authorized purchaser and any person affiliated therewith.

Section II. Covered Transactions

Effective January 1, 1987, if each condition of section III of this exemption is satisfied, the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A), (B) or (D) of the Code shall not apply to—

(a) The purchase of Coins by an IRA from an authorized purchaser; or

(b) The sale by an IRA of Coins to be authorized purchaser;

(c) The extension of credit in connection with the settlement of transactions described in (a) or (b).

Section III. Conditions

(a) In the case of an IRA with is an

employee benefit plan covered by Title I of the Employee Retirement Income Security Act of 1974 (ERISA), the covered transaction is the type of transaction described in section 404(c) of ERISA.

(b) The transaction is directed either by the individual for whose benefit the IRA is maintained or by an independent third party appointed by such individual.

(c) Neither the authorized purchaser nor any affiliate thereof has any discretionary authority or control respecting the management or disposition of the IRA assets involved in the transaction, or renders investment advice (within the meaning of 28 CFR 54.4975-9(c)) respecting those assets.

(d) Each denomination of Coins offered to IRAs pursuant to this exemption is purchased and sold by the authorized purchaser in transactions with unrelated parties in the ordinary course of its business with customers other than IRAs.

(e) At the time the transaction is executed, the terms of the transaction must be not less favorable to the IRA than the terms afforded by the disqualified person or any affiliate thereof in comparable Coin transactions involving unrelated parties.

(f) Payment for, and delivery of, Coins in settlement of a covered transaction is made simultaneously and in no event more than 10 business days after execution of the transaction involved, and no interest is charged for the period of time between execution and settlement.

(g) The disqualified person provides current price quotations to the person directing the investments of the IRA immediately prior to the time a covered transaction is executed so that such person will know the exact price at which the purchase or sale will occur.

(h) A separate written confirmation statement is issued with respect to each covered transaction to the person who directs the transaction for the IRA. The confirmation shall disclose the date, quantity, and price of the Coins bought or sold as well as the fact that the disqualified person acted as a principal in the transaction. The confirmation shall be issued in no event more than 10 business days after the execution of the transaction.

(i) With regard to transactions entered into subsequent to (enter date 90 days after grant of the final exemption), prior to its engaging in covered transactions the disqualified person prepares and provides to the person directing the

investments of the IRA material information regarding transactions in Coins, and furnishes supplemental information to the person directing the investments of IRAs which have invested in Coins if material changes occur. This information must include:

(1) A general description of the manner in which Coins are priced in the market.

(2) Disclosure of any fees for services or special or minimum transaction costs that will be incurred as the result of the purchase or sale of Coins by an IRA.

(3) Any minimum quantity of Coins which must be brought or sold.

(4) Disclosure of the role of the disqualified person as a principal in the transaction.

(5) An explanation that the purchase or sale of Coins between the IRA and the authorized purchaser would be prohibited in the absence of an exemption, a discussion of the arm's-length pricing standard of this exemption and disclosure that records are accessible which would enable the person directing investments of the IRA to determine whether the conditions of this exemption have been met.

(j) The disqualified person maintains or causes to be maintained for a period of at least six years from the date of settlement of a covered transaction such records as are necessary to allow accredited persons to determine whether the conditions of the exemption have been met. The records shall include daily information indicating each customer (including each IRA and each other client) with whom a transaction involving Coins was consummated, the price and number of Coins involved, and the date and the time at which the transaction was executed. The persons directing the investments of an IRA are not authorized to examine a disqualified person's trade secrets or financial information which is privileged or confidential. The records must be reasonably accessible and must be available for examination during normal business hours. Notwithstanding these recordkeeping requirements, a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the disqualified person, such records are lost or destroyed prior to the end of the six year period.

Signed at Washington DC, this 23rd day of

September, 1991.

Alan D. Lebowitz,

Deputy Assistant Secretary for Program Operations, Pension and Welfare Benefits Administration, Department of Labor.

John E. Burke,

Assistant Commissioner Employee Plans and Exempt Organizations, Internal Revenue Service.

[FR Doc. 91-23359 Filed 9-26-91; 8:45 am]

BILLING CODE 4510-20-M