DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR Area Counsel (TE/GE), Pacific Coast/Central Mountain Area
Attn: Laura Beth Heisen

FROM: Michael Roach, Chief CC:TEGE:EB:QP1

SUBJECT: Adequacy of Department of Labor Notification Pursuant to I.R.C. §4975(h)

This Field Service Advice responds to your memorandum dated November 20, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

DISCLOSURE STATEMENT

Field Service Advice is Chief Counsel Advice and is open to public inspection pursuant to the provisions of section 6110(i). The provisions of section 6110 require the Service to remove taxpayer identifying information and provide the taxpayer with notice of intention to disclose before it is made available for public inspection. Sec. 6110(c) and (i). Section 6110(i)(3)(B) also authorizes the Service to delete information from Field Service Advice that is protected from disclosure under 5 U.S.C. § 552 (b) and (c) before the document is provided to the taxpayer with notice of intention to disclose. Only the National Office function issuing the Field Service Advice is authorized to make such deletions and to make the redacted document available for public inspection. **Accordingly, the Examination, Appeals, or Counsel recipient of this document may not provide a copy of this unredacted document to the taxpayer or their representative.** The recipient of this document may share this unredacted document only with those persons whose official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

LEGEND

Employer A =
Individual B =
Individual C =

Individual D =
Plan X =
Date 1 =
Date 2 =
Date 3 =

ISSUES

Whether the Internal Revenue Service's notification to the Department of Labor was sufficient for purposes of I.R.C. §4975(h) as to Employer A and Individuals B, C and D.

CONCLUSIONS

The notification of the Department of Labor was sufficient for purposes of §4975(h) as to Employer A and Individuals B, C, and D.

FACTS

Individual's B, C, and D each took loans from Employer A's defined benefit pension plan which the Service determined were prohibited transactions under I.R.C. §4975. On Date 1, an Appeals Officer in the Los Angeles Appeals Office of the Service notified the local office of the Department of Labor (DOL) of the prohibited transactions. Specifically, using form Letter 2391(P), the Appeals Officer expressly identified Plan X in the heading of the letter as the affected plan and Employer A as the employer/sponsor. The text of the letter states that the "above referenced case has been referred to us by the Los Angeles Key District, EP/EO Division." The text of the letter also states that the Appeals Officer has jurisdiction over Individuals B and C and that these two individuals engaged in prohibited transactions by borrowing from Plan X. The letter does not refer to Individual D. The letter concludes by asking DOL to review its records to ascertain if there is any DOL involvement in "the above referenced cases" and to respond within 60 calendar days. It does not appear that the examining agent notified DOL of the alleged prohibited transactions.

In response, DOL sent a letter, dated Date 2, to the IRS Appeals Office which referred to Plan X as the subject of the letter. The letter states that DOL received the letter of Date 1 "regarding the referenced Pension Plan" and that "our office has no involvement in the above referenced case."

A notice of deficiency was issued on Date 3.

LAW AND ANALYSIS

Sections 4975(a) and (b) of the Code impose excise taxes upon disqualified persons who participate in prohibited transactions. Section 4975(h) provides, however, that before the Internal Revenue Service sends a notice of deficiency with respect to such taxes, the Secretary of the Treasury shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain correction of the prohibited transaction or to comment on the imposition of the tax.

Similarly, section 3003(a) of ERISA provides that, unless the Secretary of the Treasury finds the collection of a tax under §4975 is in jeopardy, the Secretary shall, in accordance with §4975(h), notify the Secretary of Labor before sending a notice of deficiency with respect to the tax and afford the Secretary an opportunity to comment on the imposition of the tax.

The procedures for providing such notice, as well as for other coordination activities, are set forth in an agreement between the Pension and Welfare Benefits Administration (PWBA) of DOL and the Service, entitled "Procedures for Coordination of Examination and Litigation Activities" (the Agreement). Internal Revenue Manual, Exhibit 7.6.1.5-1. Part II of the Agreement provides that specific checksheets are to be used by each agency to notify the other agency of certain issues arising in the examinations of plans. Specifically, the Agreement states that the IRS examiners are to use Checksheet B to notify the PWBA of prohibited transactions discovered in the course of an examination. Checksheet B provides spaces to identify the Employer/Sponsor of the plan as well as the name of the plan involved but does not provide a specific space to identify any disqualified persons involved in the transaction.

Part III of the Agreement sets forth the rules for IRS Appeals Offices. The relevant portion provides as follows:

> The following procedures apply to all cases received by IRS Appeals Offices involving examinations of employee benefit plans within the meaning of section A.2. of Part II.
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> A. The Chief, Appeals Office (or designee) will send a notice to the Area Director's/District Supervisor's Office. To ensure that notice has been given to DOL as required by IRC 4971(d) and 4975(h), the Appeals Office will follow the procedures of B. and C. of this part.
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> B. The Appeals Office will not take final action to settle the case, concede any Government issue, enter into a closing agreement with any taxpayer, issue an notice of deficiency with respect to taxes under section 4971 or 4975 that are not in jeopardy, or proceed with any action to revoke the favorable determination letter or qualification letter of any plan prior to the earlier of the date when the Appeals Office receives a response from PWBA or 60 days after the date of the Appeals Office's letter to PWBA.

C. PWBA will, within 60 days of the date of the letter from the Appeals Office, reply to the Appeals Office in writing if PWBA is taking any action concerning the referred case.

Under the Agreement, the notice required by §4975(h) may be provided by either the examining agent by using Checksheet B or by the Appeals Office. In the instant case, it is our understanding that the examining agent did not send a Checksheet B to the PWBA. Accordingly, the requirements of §4975(h) can only be satisfied if the letter sent by the Appeals Office was sufficient.

Part III of the Agreement does not specify that a particular form must be used by the Appeals Office to satisfy the requirements of the Agreement. Exhibit 8.16.1-3 of Part VIII of the Internal Revenue Manual, however, does provide a form letter that can be used in these cases. This letter is similar, although not identical to the Letter 2391(P) used by the Appeals Office in this case. Both letters provide a space in the heading to identify the Employer/Sponsor and the Plan Name but no space is provided in the heading to identify any other disqualified persons. Neither the form letters nor the IRM instructions to the Appeals Office provide that the names of the disqualified persons are to be provided. IRM 8.16.1.5.1. The form letters are similar in this regard to Checksheet B. The Checksheet provides a space for the Employer/Sponsor of the plan and the Plan Name but does not provide a specific space to identify the disqualified persons.

There is no legislative history for §4975(h) or for ERISA §3003 that addresses the question of what type of notice will be adequate under those sections. These provisions were apparently a compromise suggested by the Nixon Administration to resolve conflicting provisions in the House and Senate bills, but there is no explanation of the notice required. Administration Recommendations to the House and Senate Conferees on H.R. 2 to Provide for Pension Reform, p.5 (April 1974).

The Tax Court, however, has ruled that §4975(h) requires only that the Commissioner notify DOL of its intent to determine excise tax deficiencies and that DOL be given the opportunity to become involved. In Thoburn v. Commissioner, 96 T.C. 132 (1990), the taxpayers argued that a notice provided to DOL was insufficient for purposes of 4975(h). In that case the Appeals Officer sent a letter to DOL concerning the affected plan which stated that “the above referenced case has been referred to us by the Atlanta Key District Office, EP/EO Division” and requested that DOL review its records and “ascertain if there is any involvement in the above referenced case.” The letter was sent shortly after the IRS and DOL had modified the Coordination Agreement and changed the form letter to be used to notify DOL. The IRS notice to DOL conformed to the form letter that had been

replaced rather than to the new version.[1] On the other hand, the notice had been sent to the DOL office referred to in the new agreement rather than in the prior version. The Tax Court concluded that these discrepancies were insignificant.

> [B]oth respondent and DOL recognized the IRS letter as a harbinger of excise tax deficiency determinations and a request that DOL respond if it intended to become involved.
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> We do not consider material the fact that the IRS-DOL agreement was amended and that the IRS letter did not conform in exact detail to the amended form letter. The discrepancies are insignificant and do not detract from the fact that respondent notified DOL of his intent to determine excise tax deficiencies and DOL was given an opportunity to become involved. The statute requires no more.

Similarly, in Goulard v. Commissioner, T.C. Memo. 1990-448, *modified by* T.C. Memo 1990-525, the Commissioner alleged that certain loans to the petitioners from a qualified plan were prohibited transactions. Accordingly, a Checksheet B was sent to DOL stating that the "IRS...intends to impose 4975 excise tax against all disqualified persons." Copies of the plan's returns were sent to DOL with the checksheet. Citing Thoburn, the court concluded that the notice was sufficient although the checksheet apparently did not name any of the disqualified persons involved.

The current version of the Agreement between DOL and IRS does not include a particular form letter to be used by an Appeals Officer, but the letter used in this case is similar in most respects to Checksheet B. Like the checksheet, the letter has spaces to identify the Employer/Sponsor of the plan as well as the Plan Name and Plan Number, but does not include spaces to identify the disqualified persons. Moreover, the Instructions for Completing Checksheet B do not provide for including the names of the disqualified persons where prohibited transactions are alleged.

In this case, the letter identified Employer A and Plan X and stated that various plan loans constituted prohibited transactions. The letter asked DOL to ascertain if it had any involvement in the cases and send its response. Based upon the letter sent by the Appeals Office in this case, DOL responded that it had no involvement with Plan X. These letters indicate, as stated in Thoburn, that both

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[1]The earlier version of the form letter differed from the amended version in two respects. First, the prior version referred to "Procedures for Coordination of Examination and Litigation Activities" while the amended version referred to a "Coordination Agreement." Second, the prior version gave DOL 30 days to respond while the amended form letter requested a response within 60 days.

the IRS and DOL "recognized the IRS letter as a harbinger of excise tax deficiency determinations and a request that DOL respond if it intended to become involved."

There is nothing in the Agreement between the IRS and DOL that suggests that the disqualified persons involved in a prohibited transaction must be identified. Neither the Agreement nor Checksheet B provide for it. Moreover, it does not appear that the disqualified persons were specifically identified in either Thoburn or Goulard yet the courts concluded that adequate notice was provided. Accordingly, we do not believe that each disqualified person needs to be identified in order for the notice to DOL to satisfy 4975(h) as to all of the disqualified persons and that references to some but not all of the disqualified persons does not affect the adequacy of the notice.

Please call if you have any further questions.