

## **DEPARTMENT OF LABOR**

### **Pension and Welfare Benefits Administration**

#### **[Prohibited Transaction Exemption 93-33;**

Application Number D-9124]

Amendment to Prohibited Transaction Exemption (PTE) 93-2 for the Receipt of Certain Services by Individuals for Whose Benefit Individual Retirement Accounts or Retirement Plans for Self-Employed Individuals Have Been Established or Maintained

AGENCY: Pension and Welfare Benefits Administration, U. S. Department of Labor.

ACTION: Adoption of Amendment to PTE 93-2, and redesignation as PTE 93-33.

SUMMARY: This document amends PTE 93-2, a class exemption that permits the receipt of services at reduced or no cost by an individual for whose benefit an individual retirement account (IRA) or if self-employed, a Keogh Plan is established or maintained, or by members of his or her family, from a bank, provided the conditions of the exemption are met. The amendment affects individuals with a beneficial interest in the IRAs who receive such services as well as the banks that provide such services.

EFFECTIVE DATE: The amendment is effective May 11, 1993.

FOR FURTHER INFORMATION CONTACT: Allison K. Padams, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U. S. Department of Labor (202) 219-8971 (This is not a toll-free number.); or Susan E. Rees, Plan Benefits Security Division, Office of the Solicitor, U. S. Department of Labor (202) 219-9141 (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On January 11, 1993, notice was published in the FEDERAL REGISTER (58 FR 3565) of the pendency before the Department of a proposed amendment to PTE 93-2 (58 FR 3561, January 11, 1993). PTE 93-2 provides an exemption from the sanctions resulting from the application of sections 4975(a) and (b), 4975(c)(3) and 408(e)(2) of the Internal Revenue Code of 1986 (the Code) by reason of section 4975(c)(1)(D), (E), and (F) of the Code.<sup>1</sup>

The amendment to PTE 93-2 adopted by this notice was proposed by the Department on its own motion pursuant to section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). The amendment adopted by this notice was requested in comments made in connection with the proposed exemption for the receipt of certain services at reduced or no cost by individuals establishing or maintaining individual retirement accounts or retirement plans for self-employed individuals (56 FR 8365, February 28, 1991).

The notice of pendency gave interested persons an opportunity to comment on the proposed amendment. Public comments were received pursuant to the provisions of 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.

For the sake of convenience, the entire text of PTE 93-2, as amended, has been reprinted with this notice. The Department has redesignated the exemption as PTE 93-33.

## 1. Description of the Exemption

PTE 93-2 permits the receipt of services at reduced or no cost by an individual for whose benefit an IRA or Keogh Plan is established or maintained, or by members of his or her family, from a bank, provided that the conditions of the exemption are met. Relief was limited to transactions involving IRAs and Keogh Plans which are not "employee benefit plans" covered by title I of ERISA.<sup>2</sup> The amendment to PTE 93-2 granted pursuant to this notice expands PTE 93-2 to provide relief from the restrictions of sections 406(a)(1)(D) and 406(b) of ERISA for transactions involving individuals for whose benefit a simplified employee pension (SEP) as defined under section 408(k) of the Code, is established or maintained. Specifically, the definition of IRA in PTE 93-2 has been modified to include those SEPs which provide participants with the unrestricted authority to transfer the assets to IRAs sponsored by different financial institutions.

The Department notes that all the conditions contained in PTE 93-2 still must be met under the amended class exemption. These conditions include a requirement that for purposes of determining eligibility to receive services at reduced or no cost, the deposit balance required by the bank for the IRA or Keogh Plan is equal to the lowest balance required for any other type of account which the bank includes to determine eligibility to receive reduced or no cost services. Additionally, the rate of return earned on the IRA or Keogh Plan must be no less favorable than the rate of return on an identical investment that could have been made at the same time at the same branch of the bank by a customer of the bank who is not eligible for (or who does not receive) reduced or no cost services.

Moreover, the amendment is not available for the receipt of services by third persons other than those described in the exemption. Thus, for example, no relief would be available under the exemption for the receipt of services by the employer establishing or maintaining the SEP on behalf of its employees.

## 2. Discussion of Comments Received

The Department received three letters commenting on the proposed amendment to PTE 93-2. Two commenters support the proposed amendment. However, one of these commenters believes that it is unnecessary to limit relief provided pursuant to the amendment to those SEPs which do not restrict a participant's authority to transfer his

SEP balance to IRAs sponsored at different financial institutions. The commenter notes that most prototype SEPs offered by financial institutions do not contain a transfer restriction. The Department continues to believe that the participant's ability to transfer SEP-IRA assets to a financial institution of his choice is an important safeguard under the exemption. Therefore, the Department has determined not to revise the exemption in this regard.

Another commenter requested that the Department modify the definition of deposit balance under PTE 93-2 to include SEP investments in securities for which market quotations are readily available. The Department notes that the proposed amendment did not relate to the definition of deposit balance. Accordingly, consideration of the requested modification is beyond the scope of this proceeding. Consequently, the final amendment has not been so revised.<sup>3</sup>

## General Information

The attention of interested persons is directed to the following:

(1) In accordance with section 408(a) of ERISA and section 4975(c)(2) of the Code and based upon the entire record, the Department finds that the amendment is administratively feasible, in the interests of the IRAs and their participants and beneficiaries and protective of the rights of participants and beneficiaries of such plans.

(2) The amendment 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.

(3) The amendment is applicable to a transaction only if the conditions specified in the class exemption are met.

## Exemption

Accordingly, PTE 93-2 is amended under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR 2570, Subpart B.

## Section I: Covered Transaction

Effective May 11, 1993, the restrictions of sections 406(a)(1)(D) and 406(b) of ERISA and the sanctions resulting from the application of section 4975 of the Code, including the loss of exemption of an individual retirement account (IRA) pursuant to section 408(e)(2)(A) of the Code, by reason of section 4975(c)(1)(D), (E) and (F) of the Code, shall not apply to the receipt of services at reduced or no cost by an individual for whose benefit an IRA or, if self-employed, a Keogh Plan, is established or maintained, or by members of his or her family, from a bank pursuant to an arrangement in which the

deposit balance in the IRA or Keogh Plan is taken into account for purposes of determining eligibility to receive such services, provided that each condition of Section II of this exemption is satisfied.

## Section II: Conditions

(a) The IRA or Keogh Plan, the deposit balance of which is taken into account for purposes of determining eligibility to receive services at reduced or no cost, is established and maintained for the exclusive benefit of the participant covered under the IRA or Keogh Plan, his or her spouse or their beneficiaries.

(b) The services must be of the type that the bank itself could offer consistent with applicable federal and state banking law.

(c) The services are provided by the bank (or an affiliate of the bank) in the ordinary course of the bank's business to customers who qualify for reduced or no cost banking services but do not maintain IRAs or Keogh Plans with the bank.

(d) For the purpose of determining eligibility to receive services at reduced or no cost, the deposit balance required by the bank for the IRA or Keogh Plan is equal to the lowest balance required for any other type of account which the bank includes to determine eligibility to receive reduced or no cost services.

(e) The rate of return on the IRA or Keogh Plan investment is no less favorable than the rate of return on an identical investment that could have been made at the same time at the same branch of the bank by a customer of the bank who is not eligible for (or who does not receive) reduced or no cost services.

## Section III: Definitions

The following definitions apply to this exemption:

(a) The term bank means a bank described in section 408(n) of the Code.

(b) The term IRA means an individual retirement account described in Code section 408(a). For purposes of this exemption, the term IRA shall not include an IRA which is an employee benefit plan covered by title I of ERISA, except for a Simplified Employee Pension (SEP) described in section 408(k) of the Code which provides participants with the unrestricted authority to transfer their SEP balances to IRAs sponsored by different financial institutions.

(c) The term Keogh Plan means a pension, profit sharing, or stock bonus plan qualified under Code section 401(a) and exempt from taxation under Code section 501(a) under which some or all of the participants are employees described in section 401(c) of the Code. For purposes of this exemption, the term Keogh Plan shall not include a Keogh Plan which is an employee benefit plan covered by title I of ERISA.

(d) The term deposit balance means deposits as that term is defined under 29 CFR 2550.408b-4(c)(3).

(e) An affiliate of a bank includes any person directly or indirectly controlling, controlled by, or under common control with the bank. The term control means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(f) The term members of his or her family refers to beneficiaries of the individual for whose benefit the IRA or Keogh Plan is established or maintained, who would be members of the family as that term is defined in Code section 4975(e)(6), or a brother, a sister, or spouse of a brother or a sister.

(g) The term service includes incidental products of a de minimis value provided by third persons, pursuant to an arrangement with the bank, which are directly related to the provision of banking services covered by the exemption.

Signed at Washington, D.C., this 19th day of

May 1993.

ALAN D. LEBOWITZ  
Deputy Assistant Secretary of Program Operations  
Pension and Welfare Benefits  
Administration

U.S. Department of Labor

<sup>1</sup>Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47712, October 17, 1978) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) to the Secretary of Labor.

<sup>2</sup>See 29 CFR 2510.3-2(d) and 29 CFR 2510.3-3(b).

<sup>3</sup>The Department further notes that it is currently considering the issue raised by the commenter in an application to amend PTE 93-2. The application was filed on April 19, 1993 on behalf of Citibank, N.A. and Chase Manhattan Bank, N.A. [Exemption application nos. D-9395 and 9396, respectively.]