**U.S. Department of Labor** **Employee Benefits Security Administration**
**Washington, D.C. 20210**

**September 28, 2009**

2009-02A
IRC SEC.
4975 (c)(1)

Seymour Goldberg, Esq.
Goldberg & Goldberg, P.C.
20 Crossways Park North, Suite # 412
Woodbury, NY 11797

Dear Mr. Goldberg:

This is in response to your request for guidance under section 4975 of the Internal Revenue Code (Code). Under Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding Code section 4975 has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Your request asks whether an estate planning arrangement into which you have entered to handle benefit distributions from your individual retirement account (IRA) upon your death would give rise to a prohibited transaction under Code section 4975.

Under your estate plan, you established a revocable trust, the Seymour Goldberg Revocable Trust for the Benefit of Cole Goldberg (Trust), under the laws of the State of New York for the sole benefit of your grandson, Cole Goldberg (Cole). The Trust by its terms will become irrevocable upon your death. Under Code section 401(a)(9), an IRA must distribute an IRA owner's interest in an IRA in accordance with prescribed rules governing minimum distributions, including rules applicable to distributions after the death of the IRA owner. Under implementing Treasury Regulation section 1.401(a)(9)-4, Q&A-5, an IRA distribution may be made to a trust as the IRA beneficiary and, if certain special requirements are met, the beneficiary of the trust may be treated as having been designated as the beneficiary under the IRA for purposes of calculating the required minimum distributions.[1] You represent that you have named yourself as the trustee of the Trust, Cole as the sole beneficiary of the Trust, and your son, Jason Goldberg (Jason), who is the father of Cole, as your successor trustee. You designated the Trust as the IRA beneficiary and named Cole as the identifiable Trust beneficiary for purposes of determining required minimum distributions from the IRA under applicable Code requirements.

The Trust limits the assets receivable by the Trust to assets distributed from the IRA described in the Trust. It also grants Jason, as successor trustee, among the enumerated powers, the power to "invest and reinvest the assets in the IRA in any securities, stocks, bonds or other property, real or personal, which may be deemed advisable…" Further,

[1] Whether or not your arrangement meets these requirements is an issue beyond the jurisdiction of the Department of Labor and upon which the Department will not opine.

the successor trustee of the Trust must determine the required minimum distributions for each calendar year from the IRA based upon the distribution calendar year, the account balance as of the appropriate valuation date and the appropriate life expectancy factor. The trustee or successor trustee may also request distributions from the IRA to the Trust in excess of any required minimum distributions.

You represent that as part of this arrangement, individual trustee statutory commissions under section 2309 of the New York Surrogate's Court Procedure Act will be paid to the trustee or successor trustee for serving as trustee of the Trust. These statutory commissions include commissions paid on an annual basis and upon termination of the Trust. Under section 2309 of the Surrogate's Court Procedure Act, an individual trustee is entitled to annual commissions at the following rates: (a) $10.50 per $1,000 or major fraction thereof on the first $400,000 of principal; (b) $4.50 per $1,000 or major fraction thereof on the next $600,000 of principal; (c) $3.00 per $1,000 or major fraction thereof on all additional principal held in the trust. In addition, the individual trustee is entitled to a commission from principal (at the rate of one percent) for paying out sums of money that are principal. This statutory schedule of compensation has been interpreted by New York courts as an effort to set a fixed rate schedule for the reasonable value of trustee services performed during the trust period. *See Matter of Roth*, 53 Misc. 2d 1066, 281 N.Y.S. 2d 225 (1967).

You ask whether (1) the IRA distributions to the Trust, and (2) the payment of statutory commissions associated with the IRA distributions to the Trust, would constitute prohibited transactions under Code section 4975. As you are aware, if an IRA engages in a prohibited transaction, the IRA ceases to be considered an IRA, with the resultant loss of its tax-exempt status, pursuant to Code section 408(e)(2).

Code section 4975(c)(1)(A) prohibits any direct or indirect sale or exchange, or leasing, of any property between a plan and a disqualified person. Code section 4975(c)(1)(D) prohibits any direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan. Code section 4975(c)(1)(E) prohibits a fiduciary from dealing with the income or assets of a plan in his or her own interest or for his or her own account. Treasury Regulation section 54.4975-6(a)(5) characterizes transactions described in Code section 4975(c)(1)(E) as involving the use of authority by fiduciaries to cause plans to enter into transactions when those fiduciaries have interests which may affect the exercise of their best judgment as fiduciaries.

Code section 4975(e)(1)(B) defines, in relevant part, the term "plan" to include an IRA described in Code section 408(a). Code section 4975(e)(3) defines the term "fiduciary," in relevant part, to include any person who exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. Because, as the IRA owner, you retain the discretionary authority to control and direct the investment of the IRA assets, you are a fiduciary. Jason, upon becoming the trustee of the Trust, would also be a fiduciary by reason of his authority to control management and disposition of the IRA assets. Code section 4975(e)(2) defines "disqualified person," in relevant part, to include a fiduciary and certain members of the family of a fiduciary. Code sections 4975(e)(2)(F) and 4975(e)(6) state, in relevant part, that the family of a fiduciary shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant. Consequently, you, Jason and Cole are classified as disqualified persons under Code section 4975(e)(2) as a result of being fiduciaries or members of the family of a fiduciary.

Code section 4975(e)(2)(G)(iii) defines "disqualified person," in relevant part, to include a trust or estate of which (or in which) 50 percent or more of the beneficial ownership of such trust or estate is owned directly or indirectly, or held by a fiduciary. In determining constructive ownership, Code section 4975(e)(5) requires that, for purposes of Code section 4975(e)(2)(G)(iii), indirect ownership includes that which would be taken into account under Code section 267(c), with certain exceptions and limitations. You indicated that application of this rule attributes to you the beneficial interest holdings of Cole as the sole beneficiary of the Trust. Consequently, the Trust is also classified as a disqualified person.

With respect to your first question regarding whether the IRA distributions to the Trust constitute prohibited transactions, it is the opinion of the Department that, notwithstanding the Trust's status as a disqualified person under Code section 4975(e)(2), neither the trustee's decision to take a benefit distribution from the IRA in accordance with the terms of the IRA, nor the Trust's receipt of the benefit distribution as the IRA beneficiary, is a prohibited transaction under Code section 4975(c). Code section 4975(d)(9) provides that the prohibited transaction provisions in Code section 4975(c) shall not apply to the receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in a plan provided that the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries. In the Department's view, Code section 4975(d)(9) is properly read as largely paralleling ERISA section 408(c)(1), which provides, in relevant part, that the prohibited transaction provisions of ERISA section 406 should not "be construed to prohibit any fiduciary from – (1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries." [2] Thus, the Department believes

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[2] Although Code section 4975(d)(9) reaches all disqualified persons receiving benefits and ERISA section 408(c)(1) focuses on fiduciaries, whether a distribution of benefits to a plan participant could be a prohibited transaction is a more narrow issue under the Internal Revenue Code. Unlike the ERISA section 3(14)(H) definition of "party in interest," the definition of "disqualified person" under Code section 4975(e)(2) does not include employees of an employer maintaining the plan. Disqualified persons under the Code most likely to receive benefit distributions as participants, and thus be affected by Code section 4975(d)(9), would be participants or beneficiaries who are also plan fiduciaries, officers, directors

these provisions should be read together as stating that ordinary benefit distributions are not prohibited transactions, to the extent that the benefit is computed and paid on a basis consistent with the terms of the plan, and applied to all other participants and beneficiaries. This position is consistent with the Supreme Court's decision in *Lockheed Corp. v. Spink*, 517 US 882 (1996), holding that although employees of the employer maintaining the plan are "parties in interest" under ERISA's prohibited transaction provisions, the payment of benefits due to plan participants pursuant to the terms of an otherwise lawful plan is not a "transaction" within the sense that Congress used that term in ERISA section 406 to define "prohibited transactions." Furthermore, although a plan participant or IRA owner also may be a fiduciary of the plan or IRA, it does not necessarily follow that all decisions made by a participant or IRA owner with respect to the plan or IRA are fiduciary decisions. Rather, just as a plan participant's decision to elect to take a permissible benefit distribution from an employer-sponsored plan is not a fiduciary act by the participant, an IRA owner's decision to make an otherwise permissible benefit distribution to himself or herself in accordance with the terms of the IRA is not an act by the IRA owner as a fiduciary within the meaning of the prohibitions in Code sections 4975(c)(1)(D) and (E).

With respect to your second question regarding the payment of statutory commissions from the Trust to your son, Code section 4975(c)(1)(D) prohibits a direct or indirect transfer to, or use by or for the benefit of, a disqualified person of any assets of an IRA, and Code section 4975(c)(1)(E) makes it unlawful for a fiduciary to deal with assets of an IRA in his own interest or for his own account. The Department has expressed the view that violations of Code sections 4975(c)(1)(D) and (E) would occur if a transaction were part of an agreement, arrangement or understanding in which a fiduciary caused IRA assets to be invested or used in a manner designed to benefit a person in whom such fiduciary had an interest that would affect the exercise of his or her best judgment as a fiduciary.[3] As discussed above, the decision to make an otherwise permissible benefit distribution in accordance with the terms of the IRA is not an act by the IRA owner as a fiduciary within the meaning of the prohibitions in Code sections 4975(c)(1)(D) and (E). Therefore, in the Department's opinion, a decision by an IRA owner to adopt an estate planning program that contemplates permissible IRA benefit distributions being made into a separate non-IRA trust, which is designed to provide monetary or tax benefits to himself or his family members, is not an act by the IRA owner as a fiduciary involving the use of the plan's income or assets within the meaning of the prohibitions in Code sections 4975(c)(1)(D) and (E).

Similarly, in the Department's view, your son as successor trustee would not be acting as a fiduciary of the IRA in deciding whether and how much to distribute in benefits from the IRA into the Trust, provided the IRA distributions are computed and paid on a

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or 10 percent or more shareholders of the employer who are employees covered by the plan; or owner-employees who own 50 percent or more of the employer.

[3] *See* Advisory Opinions 2000-10A (Jul. 27, 2000) and 2006-01A (Jan. 6, 2006)

basis which is permissible under the Code and consistent with the terms of the IRA. Thus, such decisions, even though influencing the amount received as statutory commissions by the trustee, would not be prohibited transactions under Code section 4975. Although the Trust is not a plan subject to fiduciary obligations under Title I of ERISA or the Code, we express no view on whether such decisions by your son would be consistent with his fiduciary obligations under any other laws that govern the Trust. For example, since the purpose of the estate plan is to allow for an extended payout period from the IRA into the Trust in order to provide monetary and tax benefits to your grandson, as the Trust's beneficiary, a decision by your son as successor trustee to take more than the required minimum distributions and thereby accelerate his receipt of statutory commissions may be evaluated under any applicable laws governing the Trust.

Where your son does act as a fiduciary of the IRA, he may not act in a manner prohibited by Code section 4975. We also note that if a person acts as a fiduciary of an IRA apart from being the IRA owner (e.g., as a result of the provision of investment advice within the meaning of Treasury Regulation section 54.4975-9(c) to the IRA owner), and causes the IRA owner to make an IRA distribution and transfer the proceeds to a vehicle which would benefit the fiduciary, the fiduciary may be seen as using the assets of the IRA in violation of Code sections 4975(c)(1)(D) and (E).[4]

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of such procedure, including section 10 therein, relating to the effect of advisory opinions.

Sincerely,

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

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[4] *See* Advisory Opinion 2005-23A (Dec. 7, 2005).