

## Precious Metals and IRA/LLC's: Storage Requirements

In 1986, Congress allowed individual retirement accounts (IRA's) to invest in certain precious metals. Since then, many IRA owners have purchased and held precious metals in IRA's as a hedge against inflation, to diversify their retirement assets, and for other investment purposes. The focus of this white paper is on the storage requirements of specifically approved coins and bullion that are owned by an "IRA/LLC". In general, the term IRA/LLC refers to an LLC that is wholly or substantially owned by an IRA or group of IRA's.

### I. IRA's and Precious Metals

As a background, collectibles are prohibited from being owned by an IRA<sup>1</sup>. If an IRA purchases a collectible, then that asset will be distributed from the IRA and will typically result in taxes and penalties assessed to the IRA owner. The term "collectible" means: (a) any work of art, (b) any rug or antique, (c) any metal or gem, (d) any stamp or coin, (e) any alcoholic beverage, or (f) any other tangible personal property specified by the U.S. Treasury Secretary.<sup>2</sup> Congress created a very limited exception to this rule when it exempted certain coins and bullion from the definition of a collectible. Section 408(m) of the Internal Revenue Code states:

(3) Exception for certain coins and bullion.—For purposes of this subsection, the term "collectible" shall not include –

(A) Any coin which is –

(i) a gold coin described in paragraph (7), (8), (9), or (10) section 5112(a) of Title 31, United States Code,

(ii) a silver coin described in section 5112(e) of Title 31, United States Code,

(iii) a platinum coin described in section 5112(k) of Title 31, United State Code,

or

(iv) a coin issued under the laws of any State, or

(B) any gold, silver, platinum, or palladium bullion of a fineness equal to or exceeding the minimum fineness that a contract market (as described in section 7 of the Commodity Exchange Act, 7 U.S.C. 7) requires for metals which may be delivered in satisfaction of a regulated futures contract,

if such bullion is in the physical possession of a trustee described under subsection (a) of this section.

Accordingly, there are two different types of approved precious metals: specifically approved coins, which are those coins that are specifically described in IRC § 408(m)(3)(A), and bullion described in IRC § 408(m)(3)(B), which may be in coin form or bar form, but for purposes herein, bullion shall refer to bullion coins.

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<sup>1</sup> 26 U.S.C.A. § 408(m)(1)

<sup>2</sup> 26 U.S.C.A. § 408(m)(2)

*Specifically Approved Coins.* The coins that are specifically approved by IRC § 408(m)(3)(A) would be Gold American Eagle Coins distributed by the United States Mint<sup>3</sup>; Silver American Eagle Coins distributed by the United States Mint<sup>4</sup>; any platinum and proof platinum coins distributed by the United States Mint; and coins issued under state law.

*Bullion.* The bullion referred to in IRC § 408(m)(3)(B) is bullion that meets the following fineness requirements: Gold that is 995 parts per 1,000 (99.5%); Silver that is 999 parts per 1,000 (99.9%); Platinum that is 999.5 parts per 1,000 (99.95%); and Palladium that is 999.5 parts per 1,000 (99.95%). Common bullion coins would be the Canadian Maple Leaf Gold Coin, the American Gold Buffalo Coin, and the Austrian Philharmonic Coin.

## II. Storage Requirements Generally

While the storage requirement for bullion coins is relatively clear, the storage requirement for specifically approved coins is unclear.

*Storage Requirements for Bullion Coins.* IRC § 408(m)(3) requires that “bullion” be in the “physical possession of a trustee described under IRC § 408(a).”<sup>5</sup> A “trustee” is a “bank or such other person who demonstrates to the satisfaction of the U.S. Treasury Secretary that the manner in which such other person will administer the [IRA] will be consistent with the requirements of this section.”<sup>6</sup> A “bank” is defined as: (1) any bank, (2) an insured credit union, and (3) a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking, or other office of such State in charge of the administration of the banking laws of such State<sup>7</sup>, e.g., a state chartered trust company. If an entity does not fit within a category above, it cannot be in possession of bullion precious metals. The trustee must be in physical possession of the bullion. Physical possession is not defined within the Internal Revenue Code. Absent case law to interpret statutory language, such language is typically given its plain meaning<sup>8</sup>. Physical possession should probably not be interpreted to mean constructive possession<sup>9</sup>, and such possession should not be delegated to a non-trustee. Therefore, the prudent course of action is to deposit such bullion into the actual physical custody and safekeeping of a precious metals depository or company that meets the Internal Revenue Code’s definition of a “bank”.

*Storage Requirements for Specifically Approved Coins.* The storage requirement for specifically approved coins described in IRC § 408(m)(3)(A) is not clear. The cause of this uncertainty comes from the last clause of IRC § 408(m)(3), which is the storage requirement for bullion. It is unclear whether specifically approved coins must be stored in the same manner as bullion. Therefore, the issue is

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<sup>3</sup> One ounce (\$50 face value), one-half ounce (\$25 face value), one-fourth ounce (\$10 face value), and one-tenth ounce (\$5 face value)

<sup>4</sup> One ounce

<sup>5</sup> 26 U.S.C.A. § 408(m)(3)

<sup>6</sup> 26 U.S.C.A. § 408(a)(2)

<sup>7</sup> 26 U.S.C.A. § 408(n)

<sup>8</sup> Physical possession describes the actions “of a person who knowingly has direct physical control over a thing”. Black’s Law Dictionary, 606-607 (5<sup>th</sup> Ed. 1983).

<sup>9</sup> Constructive possession describes the actions of a person who “although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly, or through another person or persons.” Black’s Law Dictionary, 1163 (6<sup>th</sup> Ed. 1990).

whether the bullion storage requirement clause applies to not only the bullion described in IRC § 408(m)(3)(B) (“Section B”), but also to the specifically approved coins described in IRC § 408(m)(3)(A) (“Section A”). In any event, storage should be consistent with the intent of the Internal Revenue Code and the requirement that the IRA owner cannot personally benefit from the IRA investment.

On the one hand, the physical placement of the bullion storage requirement clause in IRC § 408(m)(3) makes it difficult to determine the scope of its application. In addition, it is questionable why Congress would impose specific and restrictive storage requirements on bullion but not on the specifically approved coins. Furthermore, the specifically approved coins described in Section A are referred to in the Internal Revenue Code as bullion<sup>10</sup>. Therefore, when the bullion storage requirement clause refers to “such bullion”, it is arguably referring to the specifically approved coins described in Section A in addition to the bullion in Section B. These arguments lead to the conclusion that the specifically approved coins must be stored in the same manner as bullion, which is in the “physical possession of a trustee described under IRC § 408(a).”

On the other hand, the plain language of the bullion storage requirement of IRC § 408(m)(3) only applies to “bullion”. The language of Section B specifically refers to bullion whereas Section A does not. In addition, the bullion storage requirement expressly applies only to “*such* bullion”. This phrase and the placement of the word “such” is arguably only referring to the bullion that immediately precedes the bullion storage requirement clause, which is only bullion that meets the bullion fineness requirements of Section B. The specifically approved coins described in Section A do not meet the bullion fineness requirements of Section B. Therefore, it is our estimation that a court would likely interpret the statutory language, “*such* bullion”, to refer only to the bullion described in Section B and not to the specifically approved coins described in Section A. This position leads to the conclusion that the bullion storage requirement probably does not apply to specifically approved coins and they are not required to be stored in the same manner as bullion. However, no court has adjudicated on the issue and no IRS regulation has been released to substantiate this position, so the issue remains unclear.

It has been suggested that if the bullion storage requirement does apply to specifically approved coins that such requirement may be satisfied by storing them in a safe deposit box at a bank. Unless the safe deposit box is owned by an IRA/LLC, this course of action is not recommended because the safe deposit box would be in the name of the IRA owner and would most likely be considered personal storage. Therefore, unless an IRA/LLC is utilized, and until it is authoritatively determined by a court or the IRS that the bullion storage requirement does not apply to specifically approved coins, the most prudent course of action would be to store specifically approved coins in the same manner as bullion coins, which is to deposit them into the actual physical custody and safekeeping of a precious metals depository or company that meets the Internal Revenue Code’s definition of a “bank”.

### **III. Storage Requirements of Precious Metals in an IRA/LLC**

Some have suggested that whatever storage requirements exist for specifically approved coins, they do not apply when the coins are held by an IRA/LLC. Under the Plan Asset Rule, an IRA/LLC that is

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<sup>10</sup> 31 U.S.C. § 5112(e), (f), and (k); The Gold Bullion Coin Act of 1985, Pub. L. No. 99-185, 99 Sta. 1177 (Dec. 17, 1985) which was codified at 31 U.S.C. § 5112(a)(7), (8), (9), and (10).

owned 100% by an IRA is always subject to all of the requirements imposed upon an IRA.<sup>11</sup> Consequently, an IRA/LLC will be subject to the same storage requirements mentioned herein for IRA's. There are exceptions to the Plan Asset Rule, but generally, they will not apply to an IRA/LLC that is primarily invested into precious metals.

*Storage Requirements for Specifically Approved Coins When Using an IRA/LLC.* The storage requirement for specifically approved coins is unclear, even when an IRA/LLC is utilized. However, because a safe deposit box can be opened in the name of the IRA/LLC, such storage may be sufficient, but there is no specific authoritative guidance to substantiate that course of action. Even so, we find this course of action to be reasonable because there is an argument that (a) the bullion storage requirement does not apply to precious metals that are specifically approved coins and (b) even if it does apply to specifically approved coins, storage in a bank safe deposit box that is in the name of an IRA/LLC arguably satisfies those requirements.

*Storage Requirements for Bullion When Using an IRA/LLC.* Due to the Plan Asset Rule, an IRA/LLC that owns bullion coins is still subject to the bullion storage requirements. Therefore, it would be prudent for the LLC manager to deposit such bullion into the actual physical custody and safekeeping of a precious metals depository or company that meets the Internal Revenue Code's definition of a bank. Although some may argue that an IRA/LLC may hold bullion coin in a safe deposit box in the name of the IRA/LLC, this is not recommended because bullion has an explicit storage requirement, whereas specifically approved coins arguably do not. For example, since the Canadian Maple Leaf Coin, the American Gold Buffalo Coin, and the Austrian Philharmonic Coin are not specifically approved coins, the recommended course of action would be to deposit these coins into the actual physical custody and safekeeping of a precious metals depository or company that meets the Internal Revenue Code's definition of a "bank".

#### **IV. Conclusion**

An IRA owner should only invest into precious metals that meet the statutory requirements of IRC § 408(m)(3). Bullion coins should always be stored in the actual physical custody of a precious metals depository or company that meets the Internal Revenue Code's definition of a "bank", even when an IRA/LLC is utilized. Specifically approved coins should also be stored in the actual physical custody of a precious metals depository or company that meets the Internal Revenue Code's definition of a "bank" unless an IRA/LLC is utilized, in which case, it is likely appropriate to store them in a safe deposit box that is in the name of an IRA/LLC.

*This White Paper was published in July 2015 by Mathew N. Sorensen, Partner at Kyler Kohler Ostermiller & Sorensen, LLP and is for general informational purposes only. The content hereof does not constitute legal advice nor does it create an attorney-client relationship.*

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<sup>11</sup> CFR § 2510.3-101