

November 14, 2006

VIA FEDERAL EXPRESS/OVERNIGHT MAIL

U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue, NW, Suite N-5669
Washington, DC 20210

RECEIVED
OFFICE OF REGULATIONS
AND INTERPRETATIONS
2006 NOV 15 AM 10:59

Re: Advisory Opinion Request Regarding Section 408(b)(8) and
Prohibited Transaction Exemption ("PTE") 91-38

Ladies and Gentlemen:

On behalf of The Governor and Company of the Bank of Ireland, Dublin, Ireland ("BOI"), and pursuant to ERISA Procedure 76-1, we hereby request an advisory opinion that, in the circumstances described below, the statutory exemption contained in Section 408(b)(8) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the administrative class exemption provided by Prohibited Transaction Exemption ("PTE") 91-38 will be available with respect to collective investment funds established and maintained by BOI's state-licensed branch in Stamford, Connecticut (the "U.S. Branch").

INTRODUCTION

BOI is a multinational banking and financial services organization established in Ireland with a principal place of business in Dublin, Ireland. It was established as a chartered corporation by an Act of the Irish Parliament of 1781/2 and by a Royal Charter of King George III in 1783. Together with its direct and indirect consolidated subsidiaries (collectively, the "Subsidiaries"), BOI has worldwide banking and asset management operations and more than 16,000 employees. During the fiscal year ended March 31, 2006 BOI had aggregate profits in excess of \$1.65 billion.

BOI and the Subsidiaries have significant operations within the United States ("U.S."), as reflected by the fact that such operations generated aggregate U.S.-based revenue in excess of \$100 million during the fiscal year ended March 31, 2006 and employed more than 250 employees in the U.S. as of March 31, 2006. BOI has five Subsidiaries that are organized within the U.S. (the "U.S. Subsidiaries"). The U.S. Subsidiaries include three Subsidiaries that are registered investment advisers (the "RIA Subsidiaries") under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). As of March 31, 2006, the RIA Subsidiaries managed assets in excess of \$20 billion.

U.S. Department of Labor
November 14, 2006
Page 2

On October 5, 2006, BOI's U.S. Branch commenced full business operations. The U.S. Branch operates pursuant to a license issued on June 26, 2006 by the Connecticut Department of Banking (the "Banking Department"). Under Connecticut law, the U.S. Branch is authorized to engage in general banking business, including taking institutional deposits, lending and exercising trust powers in the State of Connecticut. See Conn. Gen. Stat. §36a-250.

The U.S. Branch is an operational arm of BOI conducting business in the U.S. under its Connecticut license and therefore not a separate legal entity. Nonetheless, the U.S. Branch is subject to regulatory oversight and examination by both the Banking Department and the Board of Governors of the Federal Reserve System. See Conn. Gen. Stat. §36a-428b; 12 U.S.C. §3107(c). Pursuant to Connecticut law, the U.S. Branch is subject to the same duties, restrictions, penalties, liabilities, conditions and limitations that would apply to a state-chartered institution. Conn. Gen. Stat. §36a-428b. The U.S. Branch is subject to suit within the U.S.

Pursuant to its authority to exercise trust powers, the U.S. Branch proposes to maintain a number of collective investment vehicles (the "Collective Investment Funds") for the pooled investment of assets of multiple clients, including employee benefit plans subject to part 4 of Subtitle B of Title I of ERISA and/or plans subject to Section 4975 of the Internal Revenue Code of 1986, as amended ("Plans"). The U.S. Branch will have full responsibility for the operation of the Collective Investment Funds, including the management of the assets of the Collective Investment Funds. However, the U.S. Branch intends to engage one or more subadvisors (which may include RIA Subsidiaries as well as unaffiliated registered investment advisors) to manage the assets of the Collective Investment Funds on a day-to-day basis, subject to the overall supervision of the U.S. Branch. In all events, the U.S. Branch will retain the power to terminate any such subadvisor on reasonably short notice and will remain fully responsible for the actions of each such subadvisor to the same extent as if it had performed such actions itself. In other words, while the U.S. Branch will fulfill its day-to-day management responsibilities through the subadvisors, it will remain fully responsible and liable for the consequences of such performance.

DISCUSSION

The question presented by this advisory opinion request is whether the U.S. Branch qualifies as a "bank or trust company" for purposes of Section 408(b)(8) of ERISA and PTE 91-38.

Section 408(b)(8) of ERISA provides an exemption from the prohibited transaction rules for purchases and sales by Plans of interests in a common or collective trust fund or pooled investment fund if the fund is "maintained by ... a bank or trust company supervised by a State or Federal agency." Similarly, PTE 91-38 provides a prohibited transaction exemption for certain transactions between bank collective investment funds in which Plans have an interest and parties in interest with respect to the Plans, provided the conditions of the exemption are

U.S. Department of Labor
November 14, 2006
Page 3

met. In particular, PTE 91-38 defines the term “collective investment fund” by borrowing the wording of Section 408(b)(8) - “a common or collective trust fund or pooled investment fund maintained by a bank or trust company” (emphasis added). Accordingly, as long as the U.S. Branch qualifies as a “bank or trust company” for these purposes, the Collective Investment Funds will be able to rely on Section 408(b)(8) and PTE 91-38, assuming that all of the other conditions of the relevant exemption are satisfied in the context of the particular transaction.¹

In this regard, the language of Section 408(b)(8) specifically refers to a bank or trust company “supervised by a State or Federal agency”. Moreover, as discussed in recently-released DOL Advisory Opinion 2006-07A, while the term “bank or trust company” is not further defined in PTE 91-38, the preamble to its predecessor (PTE 80-51) made it clear that regulation and oversight by Federal or State banking authorities provided the basis upon which exemptive relief was granted.

In an analogous context, the Securities and Exchange Commission (“SEC”) has determined, for purposes of an exemption from the registration requirements of the Securities Act of 1933, that U.S. branches of a foreign bank appear to be “virtually indistinguishable” from their domestic counterparts. In making this determination, the SEC relied upon the “substantially equivalent” nature and extent of the Federal and State regulation and supervision of the branch and state-chartered entity. See SEC Release No. 33-6661 (Sept. 23, 1986). As indicated above, the U.S. Branch will in fact be fully subject to the oversight and supervision of the Banking Department to the same extent as a comparably-licensed, stated-chartered bank in Connecticut. In this regard, the U.S. Branch is functionally equivalent to a Connecticut state-chartered bank.

Accordingly, it is respectfully submitted that a U.S. branch of a non-U.S. bank that has been licensed to engage in banking and trust business by a state banking regulator and that is subject to the same level of oversight and regulation as any other comparable banking entity established in that state should qualify as a “bank or trust company” for purposes of Section 408(b)(8) and PTE 91-38.

In reaching the foregoing conclusion, the Department should take further comfort from the following factors:

1. The U.S. Branch will be required to pledge to the Banking Department assets with a value at least equal to the greater of (a) two percent of adjusted liabilities (excluding liabilities of international banking facilities managed by the U.S. Branch) and

¹ Based upon the facts set forth above, the Collective Investment Funds will be “maintained” by the U.S. Branch for purposes of Section 408(b)(8) and PTE 91-38. See, DOL Advisory Opinions 95-16A and 2006-07A.

U.S. Department of Labor
November 14, 2006
Page 4

(b) \$1 million. Moreover, claims against the U.S. Branch will be enforceable against BOI (see 4. below).

2. By virtue of establishing the U.S. Branch, BOI is subject to the jurisdiction of the State and Federal courts in the United States and can be sued in those venues.

3. If BOI were to establish a subsidiary entity as a state-chartered bank in Connecticut, it is clear that such subsidiary entity would qualify as a bank or trust company for purposes of Section 408(b)(8) and PTE 91-38.

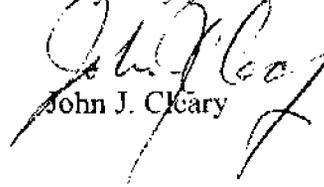
4. Indeed, because the U.S. Branch is not a separate legal entity (unlike the hypothetical subsidiary entity referred to in 3. above), claims against the U.S. Branch will be enforceable against BOI, a large and financially strong multi-national banking entity. For purposes of the U.S. Bank Holding Company Act and BOI's status as a financial holding company under that Act, BOI is considered "well capitalized."

In summary, concluding that the U.S. Branch qualifies as a "bank or trust company" for purposes of ERISA Section 408(b)(8) and PTE 91-38 would be entirely consistent with the language of those two exemptions. Moreover, it would be entirely consistent with the policies underlying those exemptions – i.e., that it is appropriate to provide this type of exemptive relief with respect to collective investment funds maintained by banking institutions that are subject to regulation and oversight by the relevant State or Federal banking authority. Finally, given all of the factors set forth above, the interests of plans and plan participants and beneficiaries would be protected and safeguarded to the same extent if these exemptions are made available to the U.S. Branch as they would be in the context of a de novo state-chartered bank or trust company.

CONCLUSION

If you have any questions or require any additional information regarding this advisory opinion request, please contact the undersigned (617-570-1199), who has been authorized by BOI to represent it in connection with this matter. Please note that we desire a conference if the Department contemplates issuing an adverse advisory opinion. Thank you for considering this request.

Very truly yours,


John J. Cleary

JJC:has