

3(14) (A) ✓
3(21) (A)
406
408(c) (3)

April 26, 1976

Dear :

This is in response to your letter of October 27, 1975, addressed to of this office. In your letter you inquired whether, under section 408(c) (3) of the Employee Retirement Income Security Act of 1974 (the Act), an individual serving as a member of a committee which has the responsibility for managing plan assets, including the responsibility for appointing an investment manager for the assets of the plan, may continue to serve as a member of the board of directors of a trust company appointed by such committee to serve as such an investment manager.

From the facts set forth in your letter, it is clear that the individuals serving as members of the investment committee are fiduciaries under section 3(21)(A) of the Act. An investment manager with authority to manage the assets of an employee benefit plan is also a fiduciary with respect to the plan under section 3(21) (A) of the Act, and, as such, is also a party in interest with respect to the plan under section 3(14) (A) of the Act.

Section 408(c) (3) of the Act provides that nothing in section 406 of the Act shall be construed to prohibit any fiduciary from "serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest." A person serving as a director of a fiduciary would be deemed to be a representative of a party in interest within the meaning of section 408(c) (3). Under section 408(c) (3), therefore, an individual who is a fiduciary with respect to an employee benefit plan by virtue of the individual's authority with respect to the appointment of an investment manager is not subject to liability under section 406 merely because he continues to serve as the director of a trust company which has been appointed as an investment manager to manage assets of such plan.

Section 408(c)(3) states merely that service as a fiduciary by a representative of a party in interest, without more, is not prohibited under section 406. In particular, section 408(c)(3) does not deal with possible prohibited transactions which might occur under section 406(b), depending on the factual situation, when a fiduciary of a plan is involved in the appointment of a corporation of which such fiduciary is a director as an investment manager of the plan's assets.

You should note, moreover, that section 408(c)(3) of the Act relates only to the construction of section 406 of the Act. In particular, section 408(c)(3) has no bearing on the applicability of the fiduciary duties set forth in section 404(a)(1) of the Act.

Because your letter also raises questions under section 4975(d)(11) of the Internal Revenue Code of 1954, we have conferred with representatives of the Internal Revenue Service and they concur in the views set forth above as they apply to such section.

Sincerely,