

January 13, 1976

Gentlemen:

[Employer] filed an application for exemption under section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 (c) (2) of the Internal Revenue Code of 1954 on November 6, 1975. The application was supplemented by letters dated December 10 and December 15, 1975. By letter dated December 29, 1975, you were advised that the Department of Labor and Internal Revenue Service had tentatively decided to deny the requested exemption. A conference was held on December 30, 1975 to discuss the exemption application and the basis for the tentative denial.

At the conference, the government expressed a willingness to consider such further information as you might wish to submit in support of the application for exemption, and we continue to be open to such a submission.

However, the information heretofore provided to us by the applicant and by counsel indicates, among other things, that [Bank] is the major secured creditor of [Bank] and at the same time is serving as trustee of the [Bank] (Plan). [Bank] has participated in the negotiation of a proposed creditor's arrangement pursuant to which plan assets are to be surrendered for nominal or no consideration. These facts have been considered by the Department of Labor in light of its statutory responsibility for the enforcement of Title I of ERISA.

It is our view that when a significant portion of plan assets consists of the securities of one issuer, it is not possible for a plan trustee to act "solely in the interest of the [plan's] participants and beneficiaries" in conformity with ERISA section 404(a) (1) if he, the trustee, is simultaneously in his non-fiduciary capacity a substantial secured creditor of the issuer of those securities.

Therefore, it is our position that is not lawful for [Bank] to serve as trustee for the Plan while it is a substantial secured creditor of [Employer].

Accordingly, please advise this office within fifteen days of the steps you have taken or propose to take in order to correct the present situation, so that this conflict can be remedied promptly and without the need for legal action by this Department.

Sincerely,