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May 21, 1976

Dear :

This is in reply to your letter of November 25, 1975, which poses a hypothetical factual situation followed by a request as to whether there would be a violation of section 406 of the Employee Retirement Income Security Act of 1974 (ERISA). I understand that you have discussed your questions with a member of the staff of this office.

The facts presented a Mr. W, who is an officer, director, and the sole shareholder of X Company, and who is one of the Trustees of X Company's Pension Trust. Mr. W is also one of directors of a national bank which performs the services of custodial agent for securities it purchases for the Pension Trust at the sole discretion of the Pension Trust. Mr. W, as a Trustee of the Pension Trust, wishes to direct the national bank to purchase, in the over-the-counter market, for the Pension Trust some shares of stock of the national bank.

Because of unknown and possibly variable factors, this hypothetical question may not be categorically answered. However, the information furnished indicates that the national bank is a party in interest vis-a-vis the Pension Trust because of the services it provides in obtaining execution of securities orders for the Pension Trust, and its function as custodial agent for the securities of the Pension Trust (see section 3(14) (A) and (B) of ERISA). Thus, other transactions, such as the purchase or sale of securities, between the bank and the plan would be prohibited under section 406. Such a prohibited purchase or sale might occur even if the plan were purchasing the securities in the over-the-counter market. The over-the-counter market includes all transactions not effected on a national securities exchange and may encompass, for example, purchases during a public offering and other direct transactions between

the issuer of securities and a purchaser. Since there is no indication of the identity of the seller(s) in the over-the-counter market it is impossible to determine from the available information whether the transaction would be prohibited under section 406(a)(1)(A) and (D) of ERISA as a prohibited purchase or sale of securities.

Further, although the plan trustees have "sole investment discretion" according to your letter, the bank may have discretion in plan investment transactions with regard to such matters as the selection of broker-dealers, the quantity of securities to be purchased, the market price, the time of execution, etc., which would make the bank a fiduciary under section 3(21) and, therefore, subject to liability as a co-fiduciary in the instant transaction if it is determined to be a prohibited transaction. This aspect of the proposed transaction needs to be clarified.

There are other areas which cannot be adequately considered without further elaboration of the facts. It is possible that the terms of the proposed transaction could be such that Mr. W would be dealing with assets of the Pension Trust in his own interest or for his own account, for example, if Mr. W as director of the national bank was served in some way by the transaction (see section 406(b)(1) of ERISA). Consideration should be given to the provisions of section 406(b)(2) which preclude Mr. W who as Trustee is in a fiduciary relationship to the Pension Trust, from acting, in his individual or any other capacity, in any transaction involving the Pension Trust, on behalf of a party, such as the national bank, the interests of which are or could be deemed to be adverse to the interest of the Pension Trust or the interests of its participants or beneficiaries.

The Internal Revenue Service has advised us that it concurs in both the conclusion and the analysis contained in this letter.

If you require additional information, please feel free to write again to this Office.

Sincerely,