P/OPINION 77-11

3(14)
3(21)

January 5, 1977

Dear :

This is in response to your letters of July 20, and August 12, 16 and 30, 1976, on behalf of (named) Savings and Loan Association requesting a ruling that, with respect to the plans and transactions described in your letters, the Association would not be a fiduciary or party in interest as these terms are defined in the Employee Retirement Income Security Act of 1974 (ERISA) or subject to the bonding requirements of ERISA. By the same letters, you have also requested a ruling from the Internal Revenue Service that, with respect to the plans and transactions described in your letters, the Association would not be a fiduciary or disqualified person as those terms are defined in section 4975 of the Internal Revenue Code of 1954 (Code). If any of these rulings cannot be issued by the Department or the Internal Revenue Service, your letters request that appropriate exemptions be granted under sections 408(a) or 412(e) of ERISA and section 4975(c)(2) of the Code.

Your letters contain the following representations in support of the requested rulings under ERISA. A standardized, low cost qualified defined contribution plan program would be offered to corporations typically with less than 100 participants. The program will provide a prototype plan, plan administration and asset management. The Association will offer its passbook savings accounts and term, higher interest yielding certificate investment accounts ("Accounts") for the investment of plan assets.

The program was developed and proposed by (named), Inc. (Named), Inc., will have sole responsibility for plan administration and will be the "named fiduciary" for plan administration within the meaning of section 402(a) of ERISA and the "plan administrator" of the plan within the meaning of section 3(16)(A) and 101(a) of ERISA. (Named), Inc., will be paid a standardized fixed fee from plan assets for plan administration. The Association will reimburse plan assets pursuant to a pre-arranged schedule for a part of the fee paid to (Named), Inc., depending on

the level of investment in the Association Accounts. Plans with investments in the Association Accounts at levels which under the schedule call for 100% reimbursement by the Association of the fee paid to (Named), Inc., can direct the plan trustee [Named Bank] to invest funds in excess of the 100% reimbursement level in the common pooled investment funds maintained by the Bank for employee benefit plans.

The trustee for all assets of the plan and the named fiduciary for asset management and control will be the Bank. The fee to be paid the Bank will be set prior to the time the program is implemented based on negotiations between (Named), Inc., and the Bank.

Assets in place in existing plans will be liquidated and invested in the Association Accounts only if deemed prudent by the trustee and plan sponsor. Otherwise, they will be invested and reinvested by the trustee. The type of the Association Accounts made available to a plan will depend on the amounts invested in the Association Accounts. The evidence of ownership of the Association Account will be issued in the name of the trustee, individual accounts will be maintained by (Named), Inc., and the Association will provide regular information reports to the trustee as to deposits, withdrawals and interest paid.

The Accounts offered by the Association under this program will be the same type of accounts offered to all customers of the Association. The Accounts are subject to regulation by the (State) Savings and Loan Commissioner. Withdrawals from such Accounts can be made only in response to directions received from the trustee through (Named), Inc., and the Association will provide information reports on substantially the same basis as it presently provides such reports to all passbook and certificate account customers.

Potential customers will be introduced to the plan program through the various branch offices of the Association, and (Named), Inc., will process resulting applications for participation in the program.

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The Association is not otherwise affiliated with the Bank or (Named), Inc. The arrangements described in your letters would, as a legal matter, be nonexclusive so that (Named), Inc., and the Association will be free to participate in similar programs with other persons and entities. Neither the Association nor (Named), Inc., will be authorized to commit the other legally in any connection.

As regards the question of whether the Association is a fiduciary as defined in section 3(21)(A) of ERISA with respect to any of the plans participating in the above-described program, your letter represents that the Association should not be considered a fiduciary for the following reasons:

(a) The Association would exercise no discretionary authority or control respecting management of the plans. Plan administration would be handled solely by (Named), Inc., as the named fiduciary for plan administration.

(b) The Association would not exercise any authority or control respecting management or disposition of plan assets. The Bank would hold the assets as trustee and named fiduciary for asset management and control. Disbursements would be made from the Association Accounts only to the trustee and upon the instruction of (Named), Inc., as plan administrator and the Bank as trustee. The Association would only offer its passbook and certificate accounts as a plan investment.

(c) The Association would not render any investment advice for a fee or other compensation as defined in 29 CFR 2510.3-21(c). The Association will provide information to plan participants and plan sponsors concerning the Association Accounts but will not render the comparative-type advice described in that regulation.

(d) The Association would not have any discretionary authority or responsibility in connection with the administration of such plans for the reasons set forth in paragraph (a) above.

As regards the question of whether the Association is a party in interest as defined in section 3(14) of ERISA (other than by reason of being a fiduciary) with respect to any plan participating in the program, your letter represents that the Association should not be considered a "party in interest" because the Association will not be providing services to a plan, will not be an owner as described in subparagraph (E) of section 3(14), will not be owned as described in subparagraph (G) of section 3(14), and will not be partner or joint venturer as described in subparagraph (I) of section 3(14).

Your letter further represents that: the Association's only activity with respect to plans, once they are established, will be to offer its Accounts as a plan investment. The fee arrangements should not be considered a partnership or joint venture with any party in interest because (Named), Inc., and the Bank are being paid a flat fee agreed upon in advance for services rendered pursuant to an agreed schedule, rather than associates in an undertaking to make and share profits. The Association's reimbursement arrangement is to reimburse plan assets, not to reimburse any party in interest. The arrangements are nonexclusive, and none of the parties has the authority or power to commit another in any connection.

With respect to the question of whether the Association should be subject to the bonding requirements of section 412 of ERISA, your letter represents that the Association should not be so subject inasmuch as it will not be a fiduciary with respect to the plans and should not be deemed to be handling funds or other property of the plans.

In this regard, you state that within the meaning of section 464.7, Part 464, issued under section 13 of the Welfare and Pension Plans Disclosure Act, as amended, the duties of the Association under the plan do not present any possibility ". . . that such funds or other property would be lost in the event of fraud or dishonesty on the part of the Association, acting alone or in collusion with others."

You represent that after the savings account is opened and the passbook or certificate is issued in the name of the trustee, the account is in no meaningful sense subject to physical contact, control or power to transfer by the Association. The only theoretical risk through dishonesty would be that the Association would deny the correct amount in the account. The Association does not have the authority to disburse funds from the account without the request of the plan administrator and the trustee. The accounts cannot be negotiated by the Association.

You conclude that because this is the performance of essentially a clerical function and information as to those accounts will be distributed periodically and is subject to mathematical verification, there would be no significant risk of mishandling.

Based upon the facts and representations contained in your letter, it is the view of the Department that the Association, by participating in the program in the manner described in your letter, would not be a fiduciary under section 3(21)(A) of ERISA, and would not be subject to the bonding requirements of section 412 of ERISA, with respect to any of the plans or transactions described in your letter.

The Department notes your representations that the Association is not a party in interest by virtue of section 3(14)(E), (G), or (I) but makes no ruling with respect to whether the Association is a party in interest by virtue of the operation of such sections. We assume that you have examined the factual situation carefully and have determined to your satisfaction that the Association's relationship to (Named), Inc., or the Bank or both is such that there is not control relationship as described in section 3(14)(E) or (G) and no partnership or joint venture relationship as described in section 3(14)(I).

With regard to the fiduciary status of the Association, neither the fact that plan monies will be held in the Association Accounts nor the fact that the Association may have assisted in the development of the subject program makes the Association a fiduciary under section 3(21)(A) of ERISA.

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With respect to the party in interest status of the Association, the mere holding of plan monies in the Association Accounts does not make the Association a service provider under section 3(14)(E) of ERISA.

With regard to whether the Association is subject to the bonding requirements of section 412 of ERISA, the monies deposited in the Association Accounts do not constitute Plan "funds or other property" as that term is defined in 29 CFR 464.5, issued under section 13 of the Welfare and Pension Plans Disclosure Act, and applicable to ERISA under the temporary bonding regulations (29 CFR 255C.412-1). This opinion applies only to the Association and not to any other person who may be handling plan funds or other property.

This ruling relates only to section 3(14), 3(21) and 412 of ERISA as they apply to the Association and not to any other provisions of ERISA. For example, we are expressing no opinion herein with respect to the prudence under section 404(a)(1)(B) of ERISA of any of the transactions described in your letter, nor do we express an opinion as to whether any of the transactions or arrangements described in your letter constitute prohibited transactions under section 406 of ERISA.[1]

Because your request also raises questions under section 4975(e)(2) of the Code respecting the definition of the term disqualified person and section 4975(e)(3) of the Code respecting the definition of the term fiduciary, we have conferred with the Internal Revenue Service and they concur in the views set forth above as they relate to section 4975(e)(2) and (3) of the Code.

Sincerely,

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[1] Further, we wish to note that ERISA section 404(c)(2) exempts the directed trustee of an individual account plan from liability for losses arising out of participant or beneficiary direction. No similar protection is available with respect to investments directed by others.