

U.S. DEPARTMENT OF LABOR  
LABOR-MANAGEMENT SERVICES ADMINISTRATION  
Pension and Welfare Benefit Programs  
Washington, D.C. 20216



**APR 30 1979**

Mr. Donald A. Mauch  
Executive Director and Secretary  
Co-operative Banks Employees'  
Retirement Association  
225 Franklin Street  
Boston, Massachusetts 02110

Dear Mr. Mauch:

This is in reply to your letter requesting an advisory opinion concerning whether the investment of funds of the Co-operative Banks Employees' Retirement Program as amended November 1, 1976 (the Program) in term deposit certificates issued by Massachusetts co-operative banks (all of which banks are participating in the Program) violates section 406 of the Employee Retirement Income Security Act of 1974 (ERISA). I regret that our heavy workload has resulted in a delay in responding to your letter.

The information submitted shows that the Program consists of three separate plans, each funded by a separate trust and administered by the trustees of the Co-operative Banks Employees' Retirement Association (the Association). The First National Bank of Boston is the trustee of each of these trusts. The Program provides pension benefits for employees of co-operative banks established under the laws of the Commonwealth of Massachusetts, the Co-operative Bank League of Massachusetts, the Association, and the Co-operative Central Bank. You state that Massachusetts co-operative banks are supervised by the office of the Commissioner of Banks of the Commonwealth of Massachusetts, which is a State agency. Article III, Section 1, of the By-laws of the Association provides, in part, that the board of trustees of the Association shall consist of up to twelve officers or employees of participating banks who are covered by the Program.

Section 3 of each trust instrument under the Program gives the plan trustee the authority to invest trust funds in its discretion but subject to such investment policies and guidelines as the trustees of the Association (the Administrator) may from time to time adopt pursuant to the plan and communicate to the plan trustee in writing in order to maintain the plan in a sound condition and to meet the

minimum funding requirements of ERISA. The plan trustee is obligated to act strictly in accordance with such investment policies and guidelines and any changes therein as so communicated to him. Section 5(d) of each trust instrument permits the plan trustee to deposit part of the plan's assets in one or more savings accounts (including those of The First National Bank of Boston) and in term deposit certificates of Massachusetts co-operative banks (including those participating in the Program) and from time to time to keep a portion of such assets in a non-interest bearing account for a reasonable period. A proposed amendment, submitted to this office by letter dated March 6, 1978, to each trust instrument specifies that effective November 1, 1977, the Massachusetts co-operative banks mentioned in section 5(d) are limited to those listed in Exhibit A, which is made a part of each trust instrument by the proposed amendment, whose accounts or certificates bear a reasonable rate of interest.

You state that the Administrator has adopted investment policies and guidelines and communicated the same to the plan trustee whereby the latter is presently directed to invest approximately 45 percent of the plan assets in term deposit certificates of Massachusetts co-operative banks, all of which co-operative banks are participating in the Program. You explain that the term deposit certificates which are issued by these banks are deposit accounts which normally have a maturity of a certain number of years, are fully insured by the Co-operative Central Bank, and bear interest at the annual interest rate which the bank pays to other holders of such term deposit certificates, which interest rate is the maximum paid by the bank for the type of term deposit certificate which is purchased by the plan trustee. The copy submitted to this office of a sample term deposit certificate issued by a Massachusetts co-operative bank representing funds held under the Program states the holder, the amount, the date of issue, the repayable date, the interest rate and provides for repayment of the amount at maturity upon surrender of the certificate and for payment of interest at the same rate or at the regular savings deposit rate if the certificate is not surrendered at maturity or if the amount is withdrawn with the bank's consent before maturity.

Section 406(a) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes, among other things, a direct or indirect lending of money or other extension of credit between the plan and a party in interest. Section 406(b)(1) and (2) of ERISA prohibits a fiduciary from engaging in acts of self-dealing or representing a party whose interests are adverse to the interests of a plan. The Massachusetts co-operative banks participating in the Program are parties in interest under section 3(14)(C) because they are the employers of some employees covered by the Program. The Administrator is a fiduciary with respect to the plan as the term "fiduciary" is defined in section 3(21) of ERISA. Thus, in the absence of an administrative or statutory exemption the proposed investment in deposit certificates would be prohibited under sections 406(a) and 406(b)(1) and (2). However, section 408(b)(4) states that the prohibitions of section 406 shall not apply to the investment of all or a part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if -- (A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or (B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

Section 2550.408b-4(c)(3) of the Department's regulations (42 FR 32392, June 24, 1977, copy enclosed) provides that the term "deposits" includes any account, temporary or otherwise, upon which a reasonable rate of interest is paid, including a certificate of deposit issued by a bank or similar financial institution. We believe that the term deposit certificates described above are deposits within the meaning of this section of the regulations.

Section 2550.408b-4(a) of the regulations explains that the exemption provided by section 408(b)(4) of ERISA applies if the bank is a fiduciary or other party in interest which meets the other requirements of that section. This

paragraph of the regulations also explains that the exemption provided by section 408(b)(4) of ERISA applies to the transactions prohibited under section 406(b)(1) and (2), but not to transactions prohibited under section 406(b)(3) (relating to fiduciaries receiving consideration for their own personal account from any party dealing with a plan in connection with a transaction involving the assets of the plan).

Section 2550.408b-4(b)(2) of the regulations requires, for plans covering employees of employers other than the bank or similar financial institution in which plan assets are deposited, that the investment be expressly authorized by a provision of the plan or trust instrument or that the investment be expressly authorized (or made) by a fiduciary of the plan (other than the bank or similar financial institution or any of its affiliates) who has authority to make such investments, or to instruct the trustee or other fiduciary with respect to investments, and who has no interest in the transaction which may affect the exercise of such authorizing fiduciary's best judgment as a fiduciary so as to cause such authorization to constitute an act described in section 406(b) of ERISA. Any authorization to make investments contained in a plan or trust instrument will satisfy the requirement of express authorization for investments made prior to November 1, 1977. Effective November 1, 1977, in the case of a bank or similar financial institution that invests plan assets in deposits in itself or its affiliates under an authorization contained in a plan or trust instrument, such authorization must name such bank or similar financial institution and must state that such bank or similar financial institution may make investment in deposits which bear a reasonable rate of interest in itself (or in an affiliate).

Since the Program covers employees of the Co-operative Bank League of Massachusetts, the Association, and the Co-operative Central Bank, as well as employees of Massachusetts co-operative banks, the provisions of section 2550.408b-4(b)(2) of the regulations apply in this case. Since the Administrator consists of officers or employees of the participating banks in which the deposits may be invested, we believe the Administrator may have a prejudicial interest in such deposits so that the

Administrator's authorization of the deposits may constitute a violation of section 406(b)(1) and (2). However, we believe that the current authorization provided in section 5(d) of each trust instrument meets the requirements of this section of the regulations with respect to investments made prior to November 1, 1977. Further, since the proposed trust amendment submitted to this office by letter dated March 6, 1978, lists the banks in which deposits are to be invested and requires a reasonable rate of interest on such deposits, the requirements of section 2550.408b-4(b)(2) of the regulations will be met effective November 1, 1977, if such proposed amendment was adopted. Based upon the foregoing, we conclude that the investment of funds of the Program in term deposit certificates issued by Massachusetts co-operative banks is exempt under section 408(b)(4) of ERISA from the prohibitions of section 406(a) and (b)(1) and (2) until October 31, 1977, and, if the proposed amendment submitted to this office by letter dated March 6, 1978 is adopted, will continue to be exempt from these prohibitions thereafter.

Your letter raises certain questions regarding section 4975 of the Internal Revenue Code of 1954 (the Code). Under Presidential Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been, with certain exceptions not here relevant, transferred to the Secretary of Labor, and the Secretary of the Treasury is bound by the interpretations of the Secretary of Labor pursuant to such authority. Therefore, this letter is issued solely by the Department.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz  
Assistant Administrator  
Office of Fiduciary Standards

Enclosure