U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216

OPINION 80-73A
404(b)

OCT 21 1980

Karl A. Schmidt, Esq.
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Los Angeles, California 90017

Dear Mr. Schmidt:

This is in response to your letters of May 15, June 4 and July 1, 1980, in which you request an advisory opinion that the Mitsubishi Bank of California (MBC) exercises management and control of plan assets as defined in Department of Labor Regulation 29 CFR §2550.404b-1(c). The following is a summary of the facts and representations contained in your submissions.

Certain United States banking and trust institutions act as directed trustees for the assets of employee benefit plans that are qualified under section 401 of the Internal Revenue Code of 1954. These institutions, by authority of the plans, seek to enter into an arrangement with MBC and certain foreign investment managers with respect to the plan assets the institutions hold in their capacity as directed trustees.

Under the proposed arrangement, MBC would be a named fiduciary for the plans in question. MBC is a bank that is organized under the laws of California and that had, as of the last day of its most recent fiscal year, equity capital in excess of $1,000,000. Certain foreign investment managers would also be either named fiduciaries for the plans or would be registered as investment advisers under the Investment Advisers Act of 1940.

Under the proposed arrangement, the foreign managers would be given the authority to direct trades, which MBC would be instructed to settle. MBC would settle the trades by electronic funds transfer to foreign subcustodians. By authority of the plans and by contractual arrangement, MBC would have the right and obligation to review, prior to settlement, the prudence and advisability of all trades it was instructed to settle. In the event MBC found a trade to be imprudent or inadvisable, MBC could "back out" or "reverse" the trade. However, MBC would not have the power, under such circumstances, to prevent settlement if the other parties involved were not willing to reverse the trade, although MBC would have the power to direct the sale by the foreign subcustodians of the securities in question subsequent to settlement. In addition, MBC would have the right and obligation to make a general review of the plan's portfolio on a monthly basis, and to direct the sale of securities if an investment was considered inadvisable.

Section 404(b) of ERISA provides that "[e]xcept as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States." Regulation 29 CFR §2550.404b-1(a)(2)(i) provides, in relevant part, that a fiduciary may maintain the indicia of ownership of certain plan assets outside the jurisdiction of the district courts of the United States if:

> "such assets are under the management and control of a fiduciary which is a corporation or partnership organized under the laws of the United States or a State, which fiduciary has its principal place of business within the United States and which is--
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> (A) A bank as defined in section 202(a)(2) of the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, equity capital in excess of $1,000,000…."

On the basis of the information you have furnished, it appears that MBC would be a bank as defined in regulation 404b-1(a)(2)(i)(A), provided MBC meets the requirements of section 202(a)(2) of the Investment Advisers Act of 1940.

Subsection (c) of regulation 404b-1 defines the term "management and control", for purposes of the regulation, as "the power to direct the acquisition or disposition through purchase, sale, pledging or other means." You have stated that MBC would be a named fiduciary under the plans in question. A named fiduciary can be given authority to direct trustees of a plan in the management and control of plan assets as provided in sections 403(a)(1) and 402(a)(2) of ERISA. If MBC is properly given this authority in accordance with those sections of the Act,[1] MBC would, under the factual circumstances described above, have the power to direct the disposition, by sale, of plan assets. Accordingly, under such circumstances MBC would have management and control over plan assets for purposes of regulation 404b-1.

Although we conclude that the arrangement you describe may be permissible under section 404(b) of ERISA, we do not express any view as to the permissibility of the arrangement under section 404(a) of the Act. In particular, we do not express any view as to the prudence of an arrangement pursuant to which two separate fiduciaries are given equal authority to direct the disposition of the same plan assets without prior consultation or coordination. Nor do we express any view as to the prudence of a delegation of management and control over plan assets to entities that might not be subject to adequate recourse in U.S. courts for any possible breach of fiduciary duties under ERISA.[2]

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

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs

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[1] You state that "MBC … will be a named fiduciary under the plans by virtue of procedures set forth therein for appointment of custodians that have the duties and responsibilities" proposed to be given to MBC, as described above. Pursuant to sections 402(a)(1) and 402(a)(2), a plan can have a procedure for identifying named fiduciaries who have the authority "to control and manage the operation and administration of the plan." Under section 403(a), however, with two exceptions, only a trustee or trustees can be given authority to "manage and control the assets of the plan." On the basis of your submission, it does not appear that MBC proposes to be a trustee. Nor does it appear that MBC proposes to be an investment manager, the first exception listed in section 403(a). Therefore, the only manner in which MBC could be given authority to manage and control plan assets would be pursuant to the other exception, where a trustee is subject to proper directions of a named fiduciary. It is not clear from your submissions whether MBC would, in fact, operate as a named fiduciary that directed the plan's directed trustees. Moreover, as you have not supplied copies of appropriate plan documents, we express no opinion as to whether MBC would be properly appointed under a procedure for the appointment of a named fiduciary having authority to direct the plan trustees in the management and control of plan assets. You should note, however, that such a procedure would not be a procedure described in section 405(c) (which limits co-fiduciary liability where certain responsibilities are allocated among named fiduciaries), as the provisions of that section do not apply with respect to trustee responsibilities, and the management and control of plan assets is a trustee responsibility.

[2] You indicate that in certain cases the foreign investment managers would be registered as investment advisers under the Investment Advisers Act of 1940. We note that 17 CFR §275.0-2 requires that non-resident investment managers applying for registration pursuant to section 203 of the Investment Advisers Act of 1940 designate the Securities and Exchange Commission as agent for service of process in an action "founded, directly or indirectly upon the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or any rule or regulation under any of said acts." 17 CFR §275.0-2 does not, however, deal with suits against a fiduciary for breach of fiduciary duties under ERISA.