U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

JUNE 8, 2007

2007-03A
ERISA SEC.
408(b)(8)

John J. Cleary, Esq.
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Dear Mr. Cleary:

This is in response to your request for an advisory opinion on behalf of The Governor and Company of the Bank of Ireland, Dublin, Ireland (BOI). The request concerns whether a U.S. branch of BOI would qualify as a "bank or trust company" within the meaning of the statutory exemption contained in section 408(b)(8) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), section 4975(d)(8) of the Internal Revenue Code (Code), [1] and Prohibited Transaction Exemption (PTE) 91-38, [2] where such U.S. branch is not a separate subsidiary of BOI and is not a State or Federally chartered bank or trust company. BOI is interested in the application of such exemptions to transactions involving collective investment funds established and maintained by a state-licensed branch of BOI located in Stamford, Connecticut (the BOI-U.S. Branch).

BOI is a multinational banking and financial services organization established in Ireland with a principal place of business in Dublin, Ireland. BOI and its subsidiaries have significant operations within the United States. Specifically, BOI has five subsidiaries that are organized within the U.S., three of which are registered investment advisers (BOI Advisers) under the Investment Advisers Act of 1940, as amended.

The BOI-U.S. Branch commenced full business operations on October 5, 2006 and operates pursuant to a license issued by the Connecticut Department of Banking (Connecticut Banking Department). Under Connecticut law, the BOI-U.S. Branch is authorized to engage in general banking business, including taking institutional deposits, lending and exercising trust powers in the State of Connecticut. In addition, the BOI-U.S. Branch is an operational arm of BOI conducting business in the U.S. under its Connecticut license and therefore not a separate legal entity.

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[1] Under Reorganization Plan No. 4 of 1978, effective December 31, 1978 [5 USC App. at 214 (2000 ed.)], the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor and the Secretary of the Treasury is bound by interpretations of the Secretary of Labor pursuant to such authority. Therefore, references in this letter to specific sections of ERISA should be read to refer also to the corresponding sections of the Code.

[2] 56 Fed. Reg. 31966 (July 12, 1991).

However, you state that the BOI-U.S. Branch, as a Connecticut branch of a foreign bank, is subject to significant regulatory oversight and review by the Connecticut Banking Commissioner (Commissioner) and the Connecticut Banking Department. To a significant extent, this oversight and review is substantially similar to that imposed on a Connecticut state-chartered bank (State Bank). In particular, before commencing its business operations, the BOI-U.S. Branch was required under Connecticut banking law to obtain its license to operate from the Commissioner pursuant to an application process comparable to that required of a State Bank and has been granted the same rights and privileges as a State Bank pursuant to the license. Connecticut banking law generally imposes the same duties, restrictions, penalties, liabilities, conditions, and limitations on the BOI-U.S. Branch as it does on a State Bank.

In addition, both the BOI-U.S. Branch and BOI's other U.S. operations are subject to the jurisdiction of, and extensive oversight and supervision by, the Board of Governors of the Federal Reserve System (Fed) pursuant to the provisions of the International Banking Act of 1978. You also represent that BOI was required to obtain the Fed's approval in order to establish the BOI-U.S. Branch. Moreover, the BOI-U.S. Branch is generally subject to examination by the Fed, may not engage in activities that would be impermissible for a national bank unless the specific approval of the Fed has been obtained, and is subject to closure by the Fed if the BOI-U.S. Branch is not operated in a manner which is consistent with the rules and regulations of the Fed. See 12 U.S.C. § 3105. Finally, the Fed has a level of supervisory authority over BOI's overall operations in the U.S. that is substantially similar to its supervisory authority over bank holding companies in the U.S.

Pursuant to its authority to exercise trust powers, the BOI-U.S. Branch proposes to maintain a number of collective investment funds (i.e., Collective Investment Funds or "CIFs") for pooled investment of assets of multiple clients, including employee benefit plans subject to part 4 of Subtitle B of Title I of ERISA and/or plans subject to section 4975 of the Code. Under the arrangements to be put in place, the BOI-U.S. Branch would have full responsibility for the operation of the CIFs, including the management of the assets of the CIFs. The BOI-U.S. Branch would engage one or more sub-advisers (which may include BOI Advisers as well as unaffiliated registered investment advisers) to manage the assets of the CIFs on a day-to-day basis. Under such arrangements, the BOI-U.S. Branch would retain supervisory responsibility and power to terminate a sub-adviser on reasonably short notice and would remain fully responsible for the actions of each sub-adviser to the same extent as if it had performed such actions itself. In this regard, sub-advisers would enter into appropriate indemnity arrangements.

You state further that the BOI-U.S. Branch will be required to pledge to the Connecticut Banking Department assets with a value at least equal to the greater of: (a) two (2) percent of adjusted liabilities (excluding liabilities of international banking facilities

managed by the BOI-U.S. Branch); or (b) $1 million. Claims against the BOI-U.S. Branch will be enforceable against BOI, a large and financially stable multi-national banking entity that is considered "well capitalized" for purposes of the U.S. Bank Holding Company Act. By virtue of establishing the BOI-U.S. Branch, BOI is subject to the jurisdiction of the State and Federal courts in the U.S., and can be sued in those venues. Finally, you state that if BOI were to establish a subsidiary U.S. entity as a state-chartered bank in Connecticut, such an entity would qualify as a "bank or trust company" for purposes of section 408(b)(8) of ERISA, section 4975(d)(8) of the Code, and PTE 91-38.

Section 406(a)(1) of ERISA provides, in part, that a fiduciary with respect to a plan shall not cause the plan to engage in certain direct or indirect transactions with a party in interest, including sales or exchanges of property between the plan and a party in interest (406(a)(1)(A)), and transfers to or use by or for the benefit of a party in interest of any assets of the plan (406(a)(1)(D)).

Section 406(b)(1) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his or her own interest or for his or her own account. Section 406(b)(2) of ERISA provides that a fiduciary shall not in his or her individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

Section 408(b)(8) of ERISA provides, in pertinent part, a statutory exemption from the prohibited transaction provisions of section 406 of ERISA for purchases and sales by a plan of interests in a common or collective trust fund or pooled investment fund if, among other things, the fund is "maintained by … a bank or trust company supervised by a State or Federal agency," if the conditions required therein are met. Code section 4975(d)(8) provides similar relief and conditions for a "plan" as described under section 4975(e)(1) of the Code, using the same statutory language with respect to a fund that is "maintained by … a bank or trust company supervised by a State or Federal agency."[3]

PTE 91-38 provides an administrative prohibited transaction exemption, pursuant to the Department's authority under section 408(a) of ERISA, for certain transactions between bank collective investment funds in which plans have an interest and parties in interest with respect to such plans,[4] if the party in interest is not the bank that maintains the

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[3] Such relief relates to prohibited transactions described under section 4975(c)(1) of the Code that may occur between plans and disqualified persons, as defined under Code section 4975(e)(2).

[4] Under PTE 91-38, the term "party in interest" includes a "disqualified person" as defined in section 4975(e)(2) of the Code. In addition, the term "employee benefit plan" in PTE 91-38 (as that term is used in certain other class exemptions) has been deemed to include "plans" described under Code section 4975(e)(1). See PTE 2002-13, 67 Fed. Reg. 9483 (March 1, 2002).

fund, or any other fund maintained by the bank or any affiliate of the bank, provided the conditions of the exemption are met.

The Department notes that PTE 91-38 defines the term "collective investment fund," with language similar to the language contained in ERISA section 408(b)(8), stating that such a fund is "…a common or collective trust fund or pooled investment fund maintained by a bank or trust company" (emphasis added). Accordingly, as long as the BOI-U.S. Branch qualifies as a "bank or trust company" for these purposes, the CIFs that are established and "maintained" by that entity would be able to rely on the relief provided under both ERISA section 408(b)(8) and PTE 91-38, assuming that all other conditions of the relevant exemptions are satisfied in the context of a particular transaction. In this regard, you state that each CIF would be "maintained" by the BOI-U.S. Branch for purposes of section 408(b)(8) and PTE 91-38. [5]

As noted above, section 408(b)(8) of ERISA specifically refers to a bank or trust company "supervised by a State or Federal agency." The term "bank or trust company" is not further defined in either section 408(b)(8) or PTE 91-38. However, in A.O. 96-15A (Aug. 7, 1996), the Department recognized that entities licensed to engage in banking and trust activities by a State bank authority that are regulated in the same manner as state-chartered banks in such State should be treated as a "bank or trust company" for purposes of ERISA section 408(b)(8) and should be treated as a "bank" for purposes of PTE 91-38. Similarly, in the preamble to the proposed PTE 80-51, 44 Fed. Reg. 44290, 44291 (July 27, 1979), the class exemption that PTE 91-38 amended and superseded, the Department made clear that regulations and oversight by Federal or State banking authorities provided the basis upon which an exemption for the subject transactions was granted.

With respect to Federal and State regulation of U.S. branches of foreign banks, the Department recognizes that the Securities and Exchange Commission (SEC), in an analogous context, has determined for purposes of an exemption from the registration requirements of the Securities Act of 1933 that U.S. branches of a foreign bank appear to be "virtually indistinguishable" from their domestic counterparts and have "substantially equivalent" Federal and State regulation and supervision as comparably-licensed, state-chartered banks. See SEC Release No. 33-6661 (Sept. 23, 1986).

Consistent with the foregoing, it is the view of the Department that a U.S. branch of a non-U.S. bank that has been licensed to engage in banking and trust business by a State regulator, and that is subject to the same level of oversight and regulation as any other comparable banking entity established in that State, would qualify as a "bank or trust company" for purposes of section 408(b)(8) and PTE 91-38. With regard to the BOI-U.S. Branch and BOI's other U.S. operations, it also is represented that both are subject to the

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[5] *See* A.O. 96-15A (Aug. 7, 1996) and A.O. 2006-07A (Aug. 15, 2006).

supervision and regulation of the Fed. Therefore, on the basis of the representations contained in your letter, it is the opinion of the Department that the BOI-U.S. Branch would be considered a "bank or trust company" under ERISA section 408(b)(8) and would be a "bank" for purposes of PTE 91-38.

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

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations