

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 84-08A
Sec. 408(a)
PTE 77-3

FEB 3 1984

Irving D. Brott, Jr., Esq.
Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, New York 14203

Re: Marine Midland Bank, N.A.
Identification Number: F-2574A

Dear Mr. Brott:

This is in response to your letters of December 31, 1982 and May 25, 1983, requesting an advisory opinion concerning the application of the prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to the situation described in your letter.

You represent that the Marine Midland Thrift Incentive Plan (the Plan) has been established by Marine Midland Banks, Inc., for the benefit of its employees as well as the employees of Marine Midland Bank, N.A. (Marine Midland) and certain other subsidiaries of Marine Midland Banks, Inc. All employers participating in the Plan are "affiliated persons" of Marine Midland within the meaning of section 2(a)(3) of the Investment Company Act of 1940.

You further represent that Marine Midland serves without compensation as Trustee of the Plan. The trust agreement provides for three separate investment funds; two equity funds with differing objectives and a savings fund consisting primarily of short term liquid assets, but including an investment contract issued by a life insurance company. Employees participating in the Plan may select one or more of the three investment funds for the investment of their interests in the Plan, in varying proportions, and may transfer monies between the funds at the end of any month.

It is proposed that the Plan be amended to also permit a participant to direct the Trustee to invest all or a portion of the participant's interest in the Plan in one or more of the three investment portfolios maintained by Mariner Institutional Funds, Inc. (Mariner), a no-load, open-end diversified investment company (mutual fund) registered under the Investment Company Act of 1940. Marine Midland provides investment advisory, administrative, custodial and other services to Mariner. A separate class of capital stock is offered with respect to each of the three portfolios. The investment portfolios consist of the U.S. Treasury Fund, the Government Fund and the Cash Management Fund (the Funds). The Plan would not pay Marine Midland any fee in connection with investments in Mariner. There would be no sales commission or redemption fee in connection with the purchase or sale of portfolio shares.

Mariner retains Marine Midland to act as the adviser, administrator, custodian, transfer agent and dividend distribution agent of each of the portfolios. Mariner also retains Lehman Management Co., Inc. (Lemco), a wholly-owned subsidiary of Lehman Brothers Kuhn Loeb Incorporated, Mariner's distributor, to act as investment manager for each portfolio.

Under the terms of the Advisory and Administrative Contract between Mariner and Marine Midland, the advisory services to be provided to Mariner by Marine Midland include money market research, analysis and statistical and economic data and information concerning interest rate trends, money market portfolio composition, credit conditions and average maturity of investments in each portfolio. Marine Midland also furnishes to Mariner's board of directors periodic reports on the investment performance of each portfolio. The administrative services furnished by Marine Midland include (i) data processing, clerical and bookkeeping services required in maintaining the financial accounts and records for Mariner and the portfolios, (ii) compiling statistical and research data required for the preparation of reports and statements which are periodically distributed to Mariner's officers and directors and (iii) handling general shareholder relations with portfolio investors, such as advice as to the status of their account, the current yield and dividend declared to date and assistance with other questions related to their accounts. Marine Midland acts as custodian, transfer agent and dividend distribution agent for the portfolios pursuant to the terms of a Custodian Agreement and an Agency Agreement.

The Management Contract between Lemco and Mariner provides that Lemco shall manage the investments of each portfolio, subject to policy established by Mariner's board of directors and the investment guidance and policy direction provided by Marine Midland. Lemco directs purchases and sales of portfolio securities and reports thereon to Mariner's officers and directors. Additionally, Lemco provides other management and administrative services including (i) preparation of proxy statements and shareholder reports for Mariner, (ii) regulatory compliance such as reports to and filings with the Securities and Exchange Commission and state securities commissions and (iii) general supervision of the operation of Mariner and the portfolios, including coordination of the services performed by Mariner's advisor and administrator, transfer agent, custodian, independent accountants, legal counsel and others. You state that Lemco also furnishes office space and certain facilities required for conducting the business of Mariner and pays the compensation of Mariner's officers, employees and directors affiliated with Lemco.

As compensation for their advisory, administrative and management services to Mariner, Marine Midland and Lemco are each paid a monthly fee with respect to each portfolio based on a percentage of the average daily value of the net assets of the portfolio. The fee rate is the same for both Marine Midland and Lemco. You represent that the Plan will not pay any investment advisory, investment management or other fee for the services described herein to Marine Midland, Lemco, Lehman Brothers Kuhn Loeb Incorporated or any affiliated person. Any other dealings between the Plan and such parties will be on a basis no less favorable to the Plan than such dealings are with other shareholders of Mariner.

You request an advisory opinion concerning the application of Prohibited Transaction Exemption 77-3 (PTE 77-3, 42 FR 18734, April 8, 1977) to the acquisition or sale of shares of Mariner's Funds by Marine Midland as Trustee of the Plan.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority

of the Secretary of the Treasury to issue rulings under section 4975 of the Internal Revenue Code of 1954 (the Code) has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

PTE 77-3 provides that the restrictions of sections 406 and 407(a) of ERISA shall not apply to the acquisition or sale of shares of an open-end investment company registered under the Investment Company Act of 1940 by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated persons (as defined in section 2(a)(3) of the Investment Company Act of 1940) of such investment adviser or principal underwriter, provided that the following conditions are met (whether or not such investment company, investment adviser, principal underwriter or any affiliated person thereof is a fiduciary with respect to the plan):

- (a) The plan does not pay any investment management, investment advisory or similar fee to such investment adviser, principal underwriter or affiliated person. This condition does not preclude the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940.
- (b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares unless (1) such redemption fee is paid only to the investment company, and (2) the existence of such redemption fee is disclosed in the investment company prospectus in effect both at the time of the acquisition of such shares and at the time of such sale.
- (c) In the case of transactions occurring (after May 31, 1977), the plan does not pay a sales commission in connection with such acquisition or sale.
- (d) All other dealings between the plan and the investment company, the investment adviser or principal underwriter for the investment company, or any affiliated person of such investment adviser or principal underwriter, are on a basis no less favorable to the plan than such dealings are with other shareholders of the investment company.

ERISA does not define the term "investment adviser". However, the Investment Company Act of 1940 at 15 U.S.C. §80a-2(a)(20) defines the term as follows:

"Investment adviser" of an investment company means (A) any person (other than a bona fide officer, director, trustee, member of an advisory board, or employee of such company as such) who pursuant to contract with such company regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or other property shall be purchased or sold by such company, and (B) any other person who pursuant to contract with a person described in clause (A) of this paragraph regularly performs substantially all of the duties undertaken by such person described in said clause (A); but does not include (i) a person whose advice is furnished solely through uniform publications distributed to subscribers thereto, (ii) a person who furnishes only statistical or other factual information, advice regarding economic factors and trends, or advice as to occasional

transactions in specific securities, but without generally furnishing advice or making recommendations regarding the purchase or sale of securities, (iii) a company furnishing such services at cost to one or more investment companies, insurance companies or other financial institutions, (iv) a person the character and amount of whose compensation for such services must be approved by a court, or (v) such other persons as the Commission may by rules and regulations or order determine not to be within the intent of this definition.

You represent that Mariner has divided the typical functions of an investment company's investment adviser between Marine Midland and Lemco. You conclude that, as a result of this division of responsibilities, both Marine Midland and Lemco are investment advisers to Mariner within the meaning of the Investment Company Act of 1940. In support of your position, you state that Marine Midland provides investment guidance and policy direction in connection with the management of each investment portfolio maintained by Mariner.

Whether Marine Midland is an investment adviser under the Investment Company Act of 1940 is based on principles developed under the Act, and the Department generally will not interpret provisions of the Investment Company Act. Therefore, you must decide whether Marine Midland is an investment adviser under that Act. If your analysis is accurate concerning the responsibilities of Marine Midland, and Marine Midland is in fact an investment adviser to Mariner under the Investment Company Act of 1940, then the restrictions of sections 406 of ERISA will not apply to the acquisition or sale of shares in Mariner's portfolio by Marine Midland as Trustee of the Plan provided that the conditions applicable to PTE 77-3 are met.

This letter is an advisory opinion under ERISA Advisory Opinion Procedure 76-1 (ERISA Proc. 76-1, 41 FR 36281, August 27, 1976). Section 10 of the procedure explains the effect of advisory opinions.

Sincerely,

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