

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



FEB 2 1988

88-02A

Sec. 406(b)(1) & (3), 408(b)(2)

Ms. Charlotte D. Roederer  
Vice President and Associate General Counsel  
Manufacturers and Traders Trust Company  
One M&T Plaza  
Buffalo, NY 14240

Re: Identification Number: F-3634A

Dear Ms. Roederer:

This is in response to your request for an advisory opinion regarding the application of the Employee Retirement Income Security Act of 1974 (ERISA) to certain "sweep services" provided by Manufacturers and Traders Trust Company (the Bank) to employee benefit plans for which the Bank acts as custodian or directed trustee. You specifically ask whether the transactions would qualify for the statutory exemptions provided by sections 408(b)(2) and/or 408(b)(6) of ERISA.

You represent that the Bank offers a daily cash "sweep service" to employee benefit plans for which the Bank acts as custodian or directed trustee. For those plans which elect to utilize the sweep service, some or all of the plans' uninvested cash is swept into one of several money market funds, all of which are sponsored by independent third parties. For each plan to which the Bank offers this service, an independent third party (or the employer, other than the Bank) functions as the sole investment advisor. The investment advisor determines whether and how much uninvested cash will be swept, and chooses which of several money market funds will be utilized. The specified amount of uninvested cash is swept into the selected investment vehicle at the close of each business day.

Each month the plans participating in the sweep service receive a dividend from the money market funds based on the prior month's daily invested cash balance in the funds. The Bank periodically calculates a "cash sweep" fee which is a percentage of the dividends received by each plan from the funds. The Bank receives no fees or other compensation from the money market funds. Thus, you represent that no part of the dividends received are allocated to the Bank for its own account as compensation for sweep services. The cash sweep fee is recorded separately in the periodic accounting and billing which the Bank sends to the employer. For most

plans, the fee is calculated and billed on a quarterly basis, but small plan accounts are billed annually. The cash sweep arrangement is subject to immediate termination without penalty and requires that the Bank notify the plan no less than 30 days prior to any change in the fees to be charged for the service.

The provisions of section 406(a)(1) (C) and (D) of ERISA prohibit a fiduciary with respect to a plan from causing the plan to engage in a transaction if he or she knows or should know that the transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest, or transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 406(b)(1) of ERISA further 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 406(b)(3) of ERISA prohibits a fiduciary from receiving a fee or other consideration for his or her own personal account from a party dealing with a plan in connection with a transaction involving the assets of the plan.

Subject to the limitations of section 408(d), section 408(b)(2) of ERISA exempts from the prohibitions of section 406(a) contracting (or making reasonable arrangements) for services (or a combination of services) with a party in interest if: (1) the service is necessary for the establishment or operation of the plan; (2) the service is furnished under a contract which is reasonable; and (3) no more than reasonable compensation is paid for the service. Regulations issued by the Department clarify the terms "necessary service" (29 CFR 2550.408b-2(b)), "reasonable contract or arrangement" (29 CFR 2550.408b-2(c)) and "reasonable compensation" (29 CFR 2550.408c-2).

Accordingly, the provision of sweep services would be exempt from the prohibitions of section 406(a) of ERISA if the conditions of section 408(b)(2) are met.<sup>1</sup> We note, however, that the questions of what constitutes a necessary service, a reasonable contract or arrangement, and reasonable compensation are inherently factual in nature. Section 5.01 of ERISA Advisory Opinion Procedure 76-1 (ERISA Proc. 76-1, 41 FR 36281, August 27, 1976) states that the Department generally will not issue opinions on such questions.

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<sup>1</sup> The Department expresses no opinion herein regarding the underlying investment of plan assets in the money market funds. In this regard, the Department notes that the statutory exemption for services does not extend to underlying investment transactions such as sales between a plan and a party in interest described in section 406 of ERISA.

With respect to the prohibitions in section 406(b), regulation 29 CFR 2550.408b-2(a) states that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b). As explained in 29 CFR 2550.408b-2(e)(1), if a fiduciary uses the authority, control or responsibility that makes him or her a fiduciary to cause the plan to enter into a transaction involving the provision of services when such fiduciary has an interest in the transaction that may affect the exercise of his or her best judgment as a fiduciary, a transaction described in section 406(b) of ERISA would occur, and that transaction would be deemed to be a separate transaction from the one involving the provision of services and would not be exempted by ERISA section 408(b)(2).

Your letter of March 31, 1987 states that the Bank does not have investment discretion with respect to the plans to which the Bank offers the sweep service, and that the decision to utilize the "sweep service" and compensate the Bank therefor is made by independent investment advisors. Your submission also explains that the Bank will not receive a fee or other benefit from any of the unrelated money market funds into which uninvested cash is swept and that the Bank will notify a plan no less than 30 days prior to any change in the fees to be charged for the service. Your letter also states that each month, the plan receives from the fund into which the plan's assets are swept a dividend based on the prior month's activity, and that the bank's "cash sweep" fee is a percentage of these dividends either paid by the plan sponsor or deducted by the Bank (at the instruction of the sponsor) from the assets of the plan.<sup>2</sup>

In the circumstances you describe, it appears that the Bank would not be exercising any of the authority, control or responsibility that makes it a fiduciary to cause a plan to pay an additional fee in connection with the "sweep services". Thus, the provision of sweep services would not, in and of itself, involve acts described in section 406(b)(1) of ERISA. The Bank also would not appear to violate section 406(b)(2) because it would not, solely by reason of the circumstances you describe, be acting on behalf of a party whose interests are adverse to those of the plan.<sup>3</sup>

With respect to section 406(b)(3), the Department notes that, under the described circumstances, the receipt of fees by the Bank from the assets of a plan for the provision of sweep services would not, in itself, constitute a violation of section 406(b)(3) of ERISA.

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<sup>2</sup> We assume that, where the bank's fee is deducted from the assets of a plan, the obligation to pay such fee is, under the governing plan documents, an obligation of the plan and not of the plan sponsor.

<sup>3</sup> In expressing this opinion, the Department assumes that no arrangement exists between either the Bank and any of the above described mutual funds or the directing plan fiduciary and any of the funds such as described in 29 C.F.R. §2509.75-2(c).

You also ask whether the provision of sweep services by the Bank would qualify for the statutory exemption provided by section 408(b)(6) of ERISA. However, to the extent that the arrangement you describe is covered by section 408(b)(2), the Department does not find it necessary to address whether an additional statutory exemption is available.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10, relating to the effect of advisory opinions. We note that pursuant to section 5 of ERISA Procedure 76-1, this advisory opinion relates solely to the arrangement described involving the Bank.

Sincerely,

Robert J. Doyle  
Acting Associate Director for Regulations and Interpretations