

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-13A
Sec. 404(a)(1)(C)

JAN 16 1981

Mr. S. E. Clark
Senior Vice President and Senior Trust Officer
City National Bank
Wilshire Boulevard at Roxbury Drive
Beverly Hills, California 90210

Re: Atalanta Selective T & F Fund Limited Partnership
Identification Number: F-0253

Dear Mr. Clark:

This is in response to your letter regarding the application of the Employee Retirement Income Security Act of 1974 (ERISA) to the investment of employee benefit plan assets in the Atalanta Selective T & F Fund Limited Partnership (the Fund).

You have stated that City National Bank (the Bank) is trustee to several employee benefit plans. Recently, various administrators of these plans have directed the Bank to invest plan assets in the Fund. The Fund Agreement provides that the Fund is established to invest its assets in a manner consistent with the provisions of ERISA. The Agreement further provides that the general partner of the Fund, the Atalanta Capital Corporation, will be an "investment manager" to all Fund assets as this term is defined in section 402(c)(3) of ERISA. Each employee benefit plan trust which signs the Agreement will be considered a limited partner of the Fund and is to supply information to the general partner so that he can comply with the provisions of ERISA. This information would include the investment objectives of the plan and a list of all parties in interest to the plan. The contributions of each plan trust will be invested by the general partner in several different accounts, each of which is to contain investments in a specific type of security (i.e. fixed income; common stock, etc.). The proportion of each plan's investment in each account will be determined by the general partner who will base his decisions on the periodically updated investment objectives of each plan as well as on the diversification requirements of section 404(a)(1)(C) of ERISA.

You have asked the following questions:

1. For diversification purposes, is the investment (of a plan in the Fund) a single limited partnership interest, or is it the underlying investments of the limited partnership?
2. If the investment is determined to be the ultimate assets of the Fund, would the trustee be prudent in accepting the terms of the limited partnership agreement as evidence of compliance of the Fund's investments with section 404(a)(1)?
3. Must the trustee attempt to supervise the actual investments of the Fund?

With respect to your first question on the diversification requirement of section 404(a)(1)(C) of ERISA, you have noted that the Conference Report on ERISA (H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. 305 (1974)) states in part that:

The conferees intend that, in general, whether the plan assets are sufficiently diversified is to be determined by examining the ultimate investment of the plan assets. For example, the conferees understand that for efficiency and economy plans may invest all of their assets in a single bank or other pooled investment fund, but that the pooled fund itself could have diversified investments. It is intended that, in this case, the diversification rule is to be applied to the plan by examining the diversification of the investments in the pooled fund.

Based on your representations regarding the nature of the Fund, it is the Department's view that for the purpose of determining whether the diversification requirement of section 404(a)(1)(C) of ERISA is met in the case of a plan which has invested in the limited partnership, the investments of the limited partnership are to be considered investments of the plans.

The foregoing is an advisory opinion under ERISA Procedure 76-1 (41 FR 36281). Accordingly, it is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

Regarding your second and third questions, ERISA Procedure 76-1 provides in section 5.02(o) that the Department ordinarily will not issue advisory opinions on ERISA section 404(a), relating to fiduciary duties as applied to a particular conduct. Accordingly, the Department declines to express an opinion on those two questions. However, it appears that your concern underlying these questions also relate, in part, to the co-fiduciary liability provisions of section 405 of ERISA. You may wish to consider particularly section 405(d), which provides that with the proper appointment of an investment manager, as provided in section 402(c)(3), a plan trustee will not be liable for the acts or omissions of such investment manager unless he knowingly participates in, or knowingly conceals, an act or omission of the investment manager, when the trustee knows that such an act or omission is a breach of fiduciary responsibility. Notwithstanding these provisions, it should be noted that fiduciaries who appoint other fiduciaries have an ongoing responsibility to periodically review the performance of such appointees. On this subject see Question FR-17 of Interpretive Bulletin 75-8 (copy enclosed).

For a general explanation of section 405 of ERISA, your attention is called to pages 299 through 302 of the Conference Report of ERISA. (H.R. Rep. 33-1280, 93rd Cong. 2d Session (1974)).

This letter does not express any opinion as to matters not specifically addressed above. Nevertheless, you may wish to consider whether the Fund's practice of holding securities in the name of the Fund (or in street name for the benefit of the Fund) satisfies the requirement of section 403(a) of ERISA that, generally, a plan assets must be held in trust. In this regard, please note that the Department has under consideration proposed regulations 29 CFR sections 2550.401b-1, 29 CFR sections 2550.403a-1 and 29 CFR sections 2550.403b-1 (44 FR 50363, August 28, 1979), amended in part on June 6, 1980 at 45 FR 39284. Those proposals relate to the definition of "plan assets" and to the requirement that such assets be held in trust.

Sincerely,

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

Enclosure