

U.S. Department of Labor

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



Reply to the Attention of:
Daniel Brown
(202) 523-8971

81-20A

FEB 9 1981

Mr. Lawrence J. Hass
Groom & Nordberg
Suite 450
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Identification Number F-1601A

Dear Mr. Hass:

This is in response to your request for an advisory opinion on behalf of Citibank, N.A. (Citibank), that the June 10, 1980 sale of the King of Prussia Park Trust (King of Prussia) by Citibank, as trustee for employee benefit plans, to RREEF USA FUND-I (RREEF) did not constitute a prohibited transaction under sections 406 and 407 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(c)(1) of the Internal Revenue Code of 1954 (IRC).

You represent that King of Prussia is a general business trust with assets consisting of 18 buildings in an industrial park. Prior to the sale, the beneficial interest of King of Prussia was owned in trust by 14 employee benefit plans. Citibank is the trustee or investment manager for each of these plans.

RREEF is an open-ended group trust, beneficial ownership of which was held at the time of the sale by 30 pension or profit sharing plans sponsored by seven different employers. The investment discretion of RREEF has been delegated to RREEF USA Partners (Partners), a general partnership and registered investment advisor under the Investment Advisors Act of 1940. Neither Citibank nor Partners has received any consideration for its own account from any party in connection with the sale of King of Prussia to RREEF.

You represent that none of the partners or trustees of RREEF Partners or any affiliate thereof has had any responsibility, authority or control with respect to the trusts which owned the King of Prussia shares or their respective plans at any time. Also, at the time of the sale, none of the shareholders of King of Prussia and none of the plans participating in RREEF had any party in

interest relationship with respect to each other, and none of the plans that had an interest in the RREEF Fund owned any shares in King of Prussia. To the best of your knowledge, no employer, affiliate of an employer or other party in interest with respect to a plan owning shares of RREEF leases any property in the King of Prussia industrial park. Nor is King of Prussia an employer of employees covered by any plan participating in the RREEF Fund. Except for the situation described below, Citibank had no relationship at the time of the transaction with the plans holding shares in RREEF, and neither Citibank nor any of its officers, directors, or employees has any ownership interest in or employment capacity with, Partners or its affiliates.

The sole exception to the statement above involves the Xerox Corporation Profit Sharing, Retirement and Savings Plan (Xerox Plan). The Xerox Plan is a defined contribution plan consisting of several separate investment accounts. One of these accounts has invested in RREEF. Citibank has no responsibility, authority, or control with respect to this account. However, Citibank serves as investment manager for another separate investment account under the Xerox Plan and is solely responsible for the investment management and discretion of this account. The account for which Citibank serves as investment manager has never had any interest or control in RREEF or King of Prussia.

Section 406(a) of ERISA generally prohibits certain transactions between a plan and a party in interest or for the benefit of a party in interest. Based on your representations, it does not appear that the plans which owned King of Prussia and the plans comprising RREEF had, at the time of the sale of King of Prussia shares, any party in interest relationship with respect to each other. Consequently, the sale of King of Prussia shares to RREEF by Citibank, as trustee, did not constitute a violation of section 406(a)(1)(A) - (D) of ERISA .

Section 406(b)(1) of ERISA prohibits a fiduciary from dealing with plan assets in his own interest or for his own account. Section 406(b)(2) of ERISA provides that a fiduciary with respect to a plan shall not, in his 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. Section 406(b)(3) of ERISA prohibits a plan fiduciary from receiving any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Based upon your representations, the subject transaction did not constitute a violation of section 406(b)(1) or (b)(3) of ERISA because Citibank, RREEF, and Partners did not receive any consideration, payment or other financial benefit for their own personal accounts in connection with the transaction.

With respect to your inquiry concerning section 406(b)(2) of ERISA, a person is a fiduciary with respect to a plan under section 3(21) of ERISA to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property

of such plan, or has any authority to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Therefore, Citibank is a fiduciary with respect to the 14 employee benefit plans selling King of Prussia shares by virtue of serving as investment manager or trustee for each plan. Similarly, Citibank is a fiduciary with respect to the investment account of the Xerox Plan for which it acts as investment manager. However, 29 CFR §2510.3-21(c)(2) issued by the Department clarifying the term "fiduciary" states that a person who is a fiduciary with respect to a plan by reason of rendering investment advice for a fee or other compensation "shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice ... for a fee or other compensation, and does not have any authority or responsibility to render such investment advice."

Citibank is not a fiduciary with respect to the investment account of the Xerox Plan that has invested in RREEF. It does not have any discretionary authority, control or responsibility, does not exercise any authority or control, does not render investment advice and does not have any authority to render investment advice with respect to such account. Therefore, Citibank, in acting on behalf of the plans that owned King of Prussia shares before June 10, 1980, is not deemed to be acting as a fiduciary with respect to Xerox plan assets invested in RREEF. Accordingly, the sale of King of Prussia shares to RREEF was not a prohibited transaction under section 406(b)(2) of ERISA.

Section 407 generally imposes limitations on a plan's acquisition or holding of employer securities and employer real property. The term "employer securities" is defined in section 407(d)(1) to mean a security issued by an employer of employees covered by the plan or by an affiliate of such employer. The term "employer real property" is defined in section 407(d)(2) to mean real property (and related personal property) which is leased to an employer of employees covered under the plan or to an affiliate of such an employer. Section 406(a)(1)(E) generally prohibits a plan fiduciary from knowingly causing the plan to engage in a direct or indirect acquisition of any employer security or employer real property in violation of section 407(a).

According to your representations, King of Prussia is neither an employer of employees covered by the plans which are the beneficial owners of RREEF, nor an affiliate of such an employer. You also represented that, to the best of your knowledge, none of the persons that have leased space in the buildings in the industrial park on and after June 10, 1980, are employers of employees (or affiliates of such employers within the meaning of section 407(d)(7) of ERISA) covered by any of the plans that participate in RREEF.

Under these circumstances, it appears that the June 10, 1980, sale of King of Prussia to RREEF did not result in the acquisition of employer securities or employer real property by the plans participating in RREEF. It is our view, therefore, that the sale did not violate sections 407(a) or 406(a)(1)(E) of ERISA.

Section 406(a)(2) of ERISA generally prohibits a fiduciary who has authority or discretion to manage the assets of a plan from knowingly permitting the plan to hold any employer security or employer real property in violation of section 407(a). Since the subject transaction did not constitute the acquisition of employer securities or employer real property by plans participating in RREEF, the sale did not, in and of itself, result in the holding by such plans of employer securities or employer real property and, consequently, did not result in a violation of section 406(a)(2).

You also inquire whether the subject transaction constitutes a prohibited transaction within the meaning of IRC §4975(c)(1). As you note in your submission, authority to determine the application of IRC §4975(c)(1) to transactions such as the type considered herein was transferred from the Secretary of the Treasury to the Secretary of Labor by Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978).

IRC §4975(c)(1) describes certain transactions between a plan and certain persons related to the plan which, if consummated, result in the imposition of taxes pursuant to IRC §§4975(a) and (b). For the reasons provided above with respect to the applicability of section 406(a)(1)(A) - (D), (b)(1), and (b)(3) of ERISA, the subject transaction did not constitute a prohibited transaction within the meaning of IRC §4975(c)(1).

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

Sincerely,

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