

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-29A
IRC S4975(d)(4)

MAR 13 1981

Mr. Alan F. Mecham
Van Cott, Bagley, Cornwall and McCarthy
141 East First South
Salt Lake City, Utah 84111

Re: Capitol Thrift and Loan
Identification Number F-1166

Dear Mr. Mecham:

This is in reply to your letter requesting an advisory opinion concerning whether Capitol Thrift and Loan (Capitol) may invest the funds of individual retirement accounts [as defined in section 408 of the Internal Revenue Code (the Code)] for which it serves as trustee and custodian in thrift certificates issued by Capitol.

Pursuant to section 2510.3-2(d) of the Department's regulations, the Department does not have jurisdiction under Title I of the Employee Retirement Income Security Act of 1974 (ERISA) over those individual retirement accounts (IRAs) described in section 408(a) of the Code which comply with the provisions of that section of the regulations.¹ Such IRAs are within the purview of Title II of ERISA, section 4975 of the Code. Under Presidential Reorganization No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been, with certain exceptions not here relevant, transferred to the Secretary of Labor, and the Secretary of the Treasury is bound by the interpretations of the Secretary of Labor pursuant to such authority. To the extent there is Title I

¹ Under the regulation, Title I is inapplicable only if: (1) no contributions to the plan are made by the employer or employee association; (2) participation is completely voluntary for employees or members; (3) the sole involvement of the employer or employee organization is to permit the sponsor to publicize the program, and to collect contributions on behalf of the sponsor through payroll deductions or dues checkoffs; and, (4) the employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

jurisdiction regarding any IRA for which Capitol serves as trustee, references to specific sections of the Code shall also refer to corresponding sections of ERISA.

The information submitted shows that Capitol is a Utah corporation authorized to engage in business as an "industrial loan corporation" by the Utah Commissioner of Financial Institutions pursuant to Title 7 Chapter 1 Section 26 of the Utah Code Annotated 1953 (1971). By letter dated December 8, 1976, Mr. W.S. Brimhall, Commissioner of Financial Institutions for the State of Utah, indicated that as the administrator of the banking laws of the State, he has determined that Capitol is an industrial loan corporation subject to his direct supervision and examination. Capitol is principally engaged in making loans secured by real or personal property.

You state that on July 28, 1977, the Internal Revenue Service ruled that Capitol was a bank for purposes of section 401(d)(1) of the Code and, therefore, could act as custodian of individual retirement accounts under section 408(a)(2) of the Code.

Utah Code Annotated 7-8-3 indicates that industrial loan corporations such as Capitol may issue thrift certificates and thrift passbook certificates for the payment of money at any time, either fixed or uncertain, with the prior written permission of the commissioner of financial institutions.

The audit report accompanying the request indicates that Capitol has issued and outstanding thrift certificates designated as bonus benefit certificates and thrift savings certificates. The bonus benefit certificates and thrift savings certificates have interest rates from 7.5 percent if held less than twelve months to a maximum of one percent over current Treasury Bill rates if held in excess of sixty months. The copy submitted to this office of a sample bonus benefit certificate issued by Capitol states the amount, the holder, the interest rate, and provides for repayment of the face amount plus accrued interest upon surrender of the certificate, and for payment of bonus interest if the certificate is retained beyond its initial maturity date. In addition, the certificate provides that the rate of interest will be reduced if the certificate is redeemed before maturity.

The Industrial Loan Guaranty Corporation of Utah, a private corporation, guarantees industrial loan corporation thrift certificates or thrift passbook certificates up to \$10,000 for each account.

Section 4975(c)(1) of the Code defines the term "prohibited transaction" to include any direct or indirect lending of money or other extension of credit between a plan and a disqualified person; the transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan; and an act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account. Section 4975(e)(2) of the Code defines the term "disqualified person" to include a fiduciary and a person providing services to the plan. Thus, in the absence of a statutory exemption, the proposed investment in thrift certificates would be prohibited under section 4975(c)(1) of the Code.

Section 4975(d)(4) of the Code states that the prohibitions of section 4975(c) shall not apply to the investment of all or part of a plan's assets in deposits which bear a reasonable rate of interest in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if --- (A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or (B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

Based upon the facts contained in your request, including that Capitol is subject to examination and supervision by the same authority, e.g., the commissioner of financial institutions, which supervises other banking institutions, it is the conclusion of the Department that Capitol is a "bank or similar financial institution" within the meaning of section 4975(d)(4) of the Code.

Section 54.4975-6(b)(4) of the Pension Excise Tax regulations provides that the term "deposits" includes any account, temporary or otherwise, upon which a reasonable rate of interest is paid, including a certificate of deposit issued by a bank or similar financial institution. We believe that the thrift certificates described above are deposits within the meaning of this section of the regulations.

Section 54.4975-6(b) of the regulations explains that the exemption provided by section 4975(d)(4) of the Code applies if the bank or similar financial institution is a fiduciary or other disqualified person which meets the other requirements of that section. This paragraph of the regulations further provides that the exemption provided by section 4975(d)(4) of the Code does not provide an exemption from section 4975(c)(1)(F) [relating to fiduciaries receiving consideration for their own personal account from any party dealing with a plan in connection with a transaction involving the income or assets of the plan], or other provisions of the Code, such as the exclusive benefit rule of section 401(a) of the Code, or other provisions of law which may impose requirements or restrictions relating to the transactions which are exempt under section 4975(d)(4). To the extent there is Title I jurisdiction, the exemption provided by section 408(b)(4) of ERISA does not provide an exemption from section 404 of ERISA (relating to fiduciary duties in general). We express no opinion on the question whether and to what extent such purchases would be consistent with the fiduciary duties set forth in section 404(a) of ERISA, including the requirements set forth in section 404(a)(1)(B) and (C). A determination whether the purchase of thrift certificates is consistent with the requirements of that section can only be made on the basis of all the facts and circumstances surrounding a particular transaction. Similar consideration should be given to whether the purchases comply with section 401(a) of the Code.

Section 54.4975-6(b)(3) of the regulations requires, for plans covering employees of employers other than the bank or similar financial institution in which plan assets are deposited, that the investment be expressly authorized by a provision of the plan or trust instrument or that the investment be expressly authorized (or made) by a fiduciary of the plan (other than the bank or

similar financial institution or any of its affiliates) who has authority to make such investments, or to instruct the trustee or other fiduciary with respect to investments, and who has no interest in the transaction which may affect the exercise of such authorizing fiduciary's best judgment as a fiduciary so as to cause such authorization to constitute an act described in section 4975(c)(1)(E) or (F). Any authorization to make investments contained in a plan or trust instrument will satisfy the requirement of express authorization for investments made prior to November 1, 1977. Effective November 1, 1977, in the case of a bank or similar financial institution that invests plan assets in deposits in itself or its affiliates under an authorization contained in a plan or trust instrument, such authorization must name such bank or similar financial institution and must state that such bank or similar financial institution may make investment in deposits which bear a reasonable rate of interest in itself (or in an affiliate).

Based on the foregoing, we conclude that the investment of IRA funds in thrift certificates issued by Capitol is exempt under section 4975(d)(4) of the Code from the prohibitions of section 4975(c)(1)(A) through (E) of the code if the conditions contained in section 4975(d)(4) have been met. In this regard we are unable to determine from your submission whether Capitol has obtained authorizations for such proposed investments or whether such authorizations meet the requirements of the regulations.

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, relating to the effect of advisory opinions.

Sincerely,

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