

**U.S. Department of Labor**

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



Reply to the Attention of:  
Barry Newman  
(202) 523- 8971

OPINION 81-72A  
Sec. 408(b)(4), 406(b)(3), 404(a)(1)

SEP 16 1981

Mr. Edward K. Mosenthal  
Berle & Berle  
122 East 42nd St.  
New York, N.Y. 10168

Re: Savings Banks Trust Company  
Identification No: F-1988

Dear Mr. Mosenthal:

This is in response to your letter regarding section 408(b)(4) of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you have requested an advisory opinion regarding the early redemption of time deposits by Savings Bank Trust Company (SBT) as trustee of certain employee benefit plans.

You have indicated that SBT is a New York trust company wholly owned by mutual savings banks located in New York State. Among other services, SBT acts as trustee for employee benefit plans established by mutual savings banks for their respective employees. Many of the plans for which SBT acts as trustee authorize it to invest plan assets in time and saving deposits of New York mutual banks, including the bank maintaining the plan for its employees (the employer bank). Present regulations of the Federal Deposit Insurance Corporation (FDIC) permit higher interest rates to be paid on time deposits but also require that a penalty be imposed for the premature withdrawal of these time deposits. This penalty is paid to the bank in which the deposit has been made. With interest rates varying greatly over the past few months, you represent that it would often be to the financial advantage of many plans to convert their existing time deposits into other deposits with a higher yield, in spite of the penalties imposed.

You have asked if the early withdrawal of these time deposits by SBT, as trustee to a plan, would be a prohibited transaction if the deposit has been made with the employer bank and the penalty, in accordance with the regulations of the FDIC, is paid to that employer bank.

Section 404(a) of ERISA provides, in part, that a fiduciary shall perform his duties with care, skill and prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. Thus, a plan fiduciary has, under section 404, an affirmative duty to act in the interests of the plan and its participants and beneficiaries and cannot remain inactive when it is clearly not prudent to do so.

Section 406(a)(1) of ERISA, in part, prohibits 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 such a transaction constitutes a direct or indirect sale or exchange of any property between the plan and a party in interest, or the transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. In addition sections 406(b)(1) & (2) of ERISA provide, in part, that a fiduciary with respect to a plan shall not deal with the assets of the plan in his or her own interest or for his or her account or 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 interest of the plan or the interests of its participants or beneficiaries.

However, section 408(b)(4) of ERISA provides that the prohibitions provided in section 406 shall not apply to the investment of all or part of a plan's assets in a bank or similar financial institution supervised by the United States or a state, if such bank or other institution is a fiduciary and if the plan covers only employees of such bank or other institution. The term "deposits" as used in section 408(b)(4) is defined in the Department of Labor regulation section 2550.403b-4 to include time deposits invested in the bank. This regulation also explains that section 408(b)(4) provides an exemption from sections 406(a)(1), (b)(1) and (2), if certain conditions are met, but does not provide an exemption from section 404(a) of ERISA or section 406(b)(3).

As we have stated in advisory opinion 81-42, issued April 6, 1981:

Since section 408(b)(4) is limited, among other restrictions, to deposits in a bank or similar financial institution supervised by the United States or a State, it is clear that Congress intended that deposits for which the exemption contained in that section is available would be subject to federal or state banking regulation. In §2550.408b-4(c)(3), moreover, the Department has recognized that the term "deposits" includes certificates of deposit which, like those at issue in this matter, are other than temporary deposits and which, therefore, may be subject to penalties upon premature redemption under federal or state banking regulation. Under these circumstances, we think that the statutory exemption encompasses the payment by a plan to a bank or similar financial institution of penalties required under federal or state banking regulation upon premature redemption. Accordingly, the payment by the Plan to (the plan trustee/employer bank) of the penalty in question would, in our view, be subject to the exemption set forth in section 408(b)(4), to the extent that the exemption was available with respect to the certificates of deposit.

This statutory exemption would, therefore, encompass the payment of penalties to the employee bank as required by federal or state banking regulations, for the premature redemption of time deposits when the plan trustee is the employer bank in which the deposit has been made and when the trustee is a third party such as SBT.

In your letter you have also asked if the contemplated transactions would be a violation of section 406(b)(3) of ERISA. This section provides that a "fiduciary with respect to a plan shall not ... receive 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". The receipt of consideration by a fiduciary directly from a plan would not be a violation of section 406(b)(3).

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 therefore, relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz  
Assistant Administrator for Fiduciary standards  
Pension and Welfare benefit Programs