

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 82-12A
Sec. 408(a), PTE 79-1

FEB 5 1982

Mr. Keith B. Betzina
Heller, Ehrman, White & McAuliffe
44 Montgomery Street
San Francisco, California 94104

Dear Mr. Betzina:

This is in reply to your letter requesting an advisory opinion concerning whether Sutro & Co. Incorporated (Sutro) will be considered to be a "trustee or plan administrator" for purposes of Prohibited Transaction Class Exemption 79-1 (PTE 79-1) when it acts as custodian of custodial accounts established under a prototype plan for self-employed persons (the Keogh Plan) or a simplified employee pension (SEP).

Sutro is a securities brokerage firm which has been authorized by the Internal Revenue Service to act as a "non-bank trustee or custodian" for IRAs, Keogh plans, and SEPs. However, this designation authorizes Sutro to act only as a "passive trustee or custodian", which, according to applicable Treasury Regulations, allows "no discretion to direct the investment of the trust funds or any other aspect of the business administration of the trust...." Treas. Reg. §1.401-12(n)(7)(i)(A). In accordance with Treasury Regulation §1.401(f)-1(b)(1)(ii), Sutro met the requirements qualifying it to be a passive trustee in order to be approved to act as a custodian. Upon IRS approval, Sutro established the Sutro & Co. Incorporated Prototype Individual Retirement Plan (the Sutro IRA) for which Sutro acts as custodian, directed solely by each participant to make the investments requested in his or her own account. Under the terms of the Sutro IRA, Sutro, as custodian, may not make any investments or dispose of any investment held in an account, except upon the written direction of the participant. In addition, Sutro is under no duty to question any such directions of the participant, to review any securities or other property held in an account, or to make suggestions to the participant with respect to the investment, retention or disposition of any assets held in any account.

Sutro now wishes to establish a Prototype Keogh Plan, the assets of which would be held in a custodial account described in Internal Revenue Code (Code) section 401(f). Each employer who adopts the Prototype Keogh Plan will act as plan administrator and each participant will direct

the investments in his or her own account in the same manner as under the IRA. Sutro also wishes to act as the custodian of IRAs established under a SEP.

Under Code section 401(f), a custodial account is treated as a qualified trust if the custodial account would meet all the requirements of a qualified trust under Code section 401(a), except for the fact that it is not a trust. Moreover, if a custodial account is treated as a qualified trust pursuant to section 401(f), the custodian of the account is treated as the trustee thereof. Section 408(h) of the Code makes a similar provision for individual retirement accounts by treating such an account as a trust and the custodian thereof as a trustee.

If Sutro is a fiduciary with respect to a Keogh Plan or a SEP, execution of brokerage transactions for the Plan or SEP may constitute prohibited transactions unless the requirements of PTE 79-1 are met.¹ PTE 79-1, however, is not available to a trustee unless that trustee returns or credits to the plan all profits produced from the execution of trades and the performance of related functions. The question which Sutro raises is whether a non-bank custodian which is treated as a trustee for tax purposes will be considered a "plan trustee or administrator" for purposes of PTE 79-1.

In Footnote 11 of the preamble to PTE 79-1, the Department indicated that the reason for limiting exemptive relief to fiduciaries other than trustees or plan administrators was based on considerations relating to the adequacy of independent approval. The Department stated that a broker having such a relationship, i.e., trustee or plan administrator, "might have so great an influence over the general operation of the plan that an independent plan fiduciary would not be able to examine critically and objectively multiple services arrangements, and thus approval of these arrangements by such a fiduciary might not be sufficient to protect plan participants and beneficiaries." 44 FR 5964 (January 30, 1979). However, the circumstances described in this case do not create the type of situation about which the above-described concern was expressed. Sutro would possess no discretionary authority over the investment of custodial funds or any other aspect of the business administration of the custodial accounts. In addition, but for the operation of Code sections 401(f) and 408(h), the custodial accounts in question would not be treated as qualified trusts and Sutro would not be treated as a trustee. See also ERISA section 403(b)(3). Therefore, the Department concludes, based on the representations made, that Sutro would not be a trustee for purposes of PTE 79-1, when it acts as a custodian of Keogh plans or SEPs pursuant to Code sections 401(f) and 408(h) and Treasury Reg. §1.401-12(n)(7)(i)(A).

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

¹ PTE 79-1 provides an exemption from ERISA section 406 and section 4975(a) and (b) of the Code.

Sincerely,

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