

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION NO. 84-14A  
Sec. 404(b)

MAR 16 1984

Thomas H. Fox  
c/o Joseph Chubb, Esq  
Davis, Polk & Wardwell  
1 Chase Manhattan Plaza  
New York, New York 10005

Re: The Euro-clear System  
Identification Number: F-2614A

Dear Mr. Fox:

This letter responds to your March 9, 1983, request for an advisory opinion under the Employee Retirement Income Security Act of 1974 ("ERISA") on behalf of Morgan Guaranty Trust Company of New York ("Morgan Guaranty") as operator of the Euro-clear system. Specifically, your request concerns whether the Euro-clear system is a "foreign clearing agency which acts as a securities depository" within the meaning of Department of Labor regulation 29 CFR §2550.404b-1(a)(2)(ii)(C) and whether the conditions pertaining to that regulation section would be satisfied.

Your submission contains the following facts and representations. The Euro-clear system is the larger of two major clearance systems for internationally traded securities. It is owned by Euro-clear Clearance System Public Limited Company (the "Company"), which is organized in the United Kingdom and has administrative offices in Zurich, Switzerland. The stockholders of the Company consist of 120 banks, financial institutions and dealers. Many of these stockholders are among the most active participants in the Euro-clear system and are active in the international securities market.

The Company is not responsible for, and does not carry out, any of the operations of the Euro-clear system. The Euro-clear system is operated by Morgan Guaranty, through its Brussels office ("Morgan Guaranty Brussels"), pursuant to an agreement ("Operating Agreement") between the Company and Morgan Guaranty.

Each Euro-clear participant enters into a standard agreement with Morgan Guaranty Brussels as operator of the Euro-clear system. This agreement is denominated Terms and Conditions Governing Use of Euro-clear ("Terms and Conditions"). Pursuant to section 2 of the Terms and Conditions, each Euro-clear participant maintains at least one securities clearance account with Morgan Guaranty Brussels and at least one current cash account with Morgan Guaranty Brussels.

Morgan Guaranty Brussels accepts securities for deposit which are expected to be traded in international markets. Securities accepted into the Euro-clear system by Morgan Guaranty Brussels may be physically held at Morgan Guaranty Brussels or other offices of Morgan

Guaranty or with other institutions (or, in certain limited cases, subcustodians used by such other institutions) as described in section 4(b) of the Terms and Conditions. Other institutions are selected by Morgan Guaranty Brussels based on its knowledge of the reputation and importance of the institutions in the financial markets which they serve.

Morgan Guaranty Brussels is supervised and regulated by the Belgian Banking Commission and by the Institut Belgo-Luxembourgeois du Change, which you indicate is an official institution reporting to the National Bank of Belgium. In their supervision and examination of Morgan Guaranty Brussels, the Belgian Banking Commission and the Institut Belgo-Luxembourgeois du Change supervise and regulate, among other things, the departments of Morgan Guaranty Brussels charged with carrying out the responsibilities of Morgan Guaranty as operator of the Euro-clear system (including the maintenance of cash accounts and securities clearance accounts).

You further represent that the Euro-clear system is a true central clearing system governed by the Terms and Conditions and the related "Operating Procedures", pursuant to which all securities of a particular class or series of any issuer deposited within the Euro-clear system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates.

Your submission includes copies of the Operating Agreement, the Terms and Conditions, and the Operating Procedures.

Section 404(b) of ERISA provides that "[e]xcept as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States." Regulation 29 CFR §2550.404b-1(a)(2)(ii)(C) provides, in relevant part, that a fiduciary may maintain the indicia of ownership of certain plan assets outside the jurisdiction of the district courts of the United States if the indicia are

[m]aintained by a bank described in paragraph (a)(2)(ii)(A)(1), in the custody of an entity that is a foreign securities depository, foreign clearing agency which acts as a securities depository, or foreign bank, which entity is supervised or regulated by a government agency or regulatory authority in the foreign jurisdiction having authority over such depositories, clearing agencies or banks, provided that... [certain conditions are satisfied.]

Regulation section 2550.404b-1(c)(2) defines the term "depository" to mean

any company, or agency or instrumentality of government, that acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates.

On the basis of the representations and other information furnished in the submission, we conclude that the Euro-clear system is a "foreign clearing agency which acts as a securities depository" within the meaning of regulation 29 CFR §2550.404b-1(a)(2)(ii)(C). Further, it appears from your representations that the Euro-clear system is supervised or regulated by a government agency or regulatory authority as described by that regulation section. Therefore, qualified banks may maintain the indicia of ownership of plan assets covered by

the regulation within the custody of the Euro-clear system, provided that the five conditions prescribed by the regulation are satisfied.

The first condition provides that the foreign entity must hold the indicia as agent for the bank. You state that a bank, as a participant in the Euro-clear system, would have a contractual custodial relationship with Morgan Guaranty Brussels, as operator of the Euro-clear system. You add that, although the Terms and Conditions, which are governed by Belgian law, do not use any particular label to describe the legal relationship between a Euro-clear participant and Morgan Guaranty Brussels, you believe that the relationship may properly be described as one of custodianship and agency.

The second condition provides that the bank must be liable to the plan to the same extent it would be if it retained the physical possession of the indicia of ownership within the United States. You comment that the bank involved will have to assure compliance with this condition.

The third condition provides that the indicia of ownership must not be subject to any right, charge, security interest, lien or claim of any kind in favor of the foreign entity except for their safe custody or administration. You indicate that Morgan Guaranty is willing to make certain accommodations in applying the Terms and Conditions so as to remove possible obstacles in satisfying this condition of the regulation.

The fourth condition provides that the beneficial ownership of the assets represented by the indicia of ownership must be freely transferable without the payment of money or value other than for safe custody or administration. You indicate that such free transferability is provided for under the Terms and Conditions.

The fifth condition provides that, upon request by the plan fiduciary who is responsible for the selection and retention of the bank, the bank must identify the name, etc., of the foreign custodial entity and of the governmental agency or other authority that supervises or regulates that entity. In this regard, you indicate the information that a bank participating in the Euro-clear system would furnish to a requesting plan fiduciary.

On the basis of your discussion regarding the conditions of the regulation, you ask us to rule to the effect that they will be satisfied if the bank involved complies with the second, third and fifth conditions.

As a matter of general practice, the Department ordinarily will not issue advisory opinions on inherently factual questions or on the form or effect in operation of a plan or program (or particular provisions thereof). See section 5.01 and 5.04 of ERISA Procedure 76-1. Inasmuch as that part of your request which relates to the conditions of the regulation appears to fall within these categories, we are unwilling to provide an opinion. However, there does not appear to be anything in your discussion of the conditions which, on its face, would necessarily indicate that the conditions would not be met.

We wish to note that this letter relates only to section 404(b) of ERISA. We do not express any view concerning whether or not use of the Euro-clear system for maintaining custody of the indicia of ownership of plan assets would be consistent with any other provision of law, including the prudence requirement of ERISA section 404(a)(1)(B).

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the

Procedure describes the effect of advisory opinions.

Sincerely,

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