U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210

APR 23 1985

85-18A
Sec. IRC 4975(c)(1)(A), (D) & (E)

Mr. Homer L. Elliott
Drinker, Biddle & Reath
Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19107

Re: The Philadelphia Saving Fund Society
Identification Number F-2824A

Dear Mr. Elliott:

This responds to your letters of January 19, March 12 and May 15, 1984, in which you request an advisory opinion regarding the prohibited transaction provisions of section 406 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code (the Code). Your letter concerns purchases and sales of stock of the Philadelphia Saving Fund Society (PSFS) by self-directed individual retirement accounts (IRAs) and self-directed Keogh plans for which PSFS acts as custodian or trustee.

You represent that PSFS is a stock savings bank with total assets of over $11 billion and approximately 35 million shares of common stock outstanding. PSFS stock has been approved for quotation on the National Association of Securities Dealers Automated Quotations (NASDAQ) System and, accordingly, is traded on the national over-the-counter (OTC) market system. Typically, several thousand shares of the stock generally have been traded on a daily basis.

PSFS acts as custodian for the IRA accounts and trustee for the Keogh accounts established by its customers. The respective plan documents for these accounts are being amended to permit the participants to direct the investments of their accounts in securities selected by the participants, including PSFS stock. Pursuant to the amendments, the participants of the PSFS Keogh and IRA accounts will have complete and sole discretion over the investments, with PSFS acting only as a nondiscretionary trustee or custodian. PSFS will effect the directed securities transactions on behalf of the participants through its recently established discount brokerage service and will select the appropriate broker who will act as agent under a contract with PSFS. PSFS will receive a brokerage commission from the participant on each transaction, either directly from the IRA or Keogh plan or as a separate charge paid by the participant.

PSFS will not make any investments or dispose of any investments for the IRA or Keogh accounts except upon written direction of the participants. Neither PSFS nor its agent will make any recommendations or otherwise advise a participant as to which securities or other investments to purchase or sell.

In cases where a participant directs that funds of his or her account be invested in PSFS stock, the stock would be purchased or sold in the OTC secondary market. In the national OTC market, the price of a stock is determined through market makers as quoted on the NASDAQ System. In that market, a prospective buyer of PSFS stock contacts his or her broker and acquires the security out of that broker's (or another market maker's) inventory. The price of the security is reflective of the supply of and demand for shares of the stock on a particular day. In the case of an actively traded issue such as PSFS stock, it would generally be virtually impossible to trace the purchaser or seller of any specific shares changing hands through the OTC market.

PSFS would not be a party to trades in its stock on behalf of PSFS Keogh or IRA participants, although it might sometimes purchase or sell PSFS shares for its own account or for its Incentive and Investment Plan on the same day that a PSFS Keogh or IRA participant buys or sells such securities. Also, PSFS does not and will not act as a market maker in its own stock.

You request an opinion that purchases and sales of PSFS stock in the OTC market by PSFS as custodian or trustee of its IRA and Keogh accounts on behalf of and at the sole direction of the participants do not constitute prohibited transactions under section 406 of ERISA or section 4975(c) of the Code.

Pursuant to section 2510.3-2(d) of the Department's regulations, the Department does not have jurisdiction under Title I of ERISA over those individual retirement accounts described in section 408(a) of the Code which comply with the provisions of that section of the regulation.[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

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[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.

Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been transferred, with certain exceptions not here relevant, 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 jurisdiction regarding any IRA or Keogh account for which PSFS serves as custodian or trustee, references to specific sections of the Code in this letter shall also refer to the corresponding sections of ERISA.

Section 4975(c)(1) of the Code prohibits, in relevant part, the sale or exchange of property between a plan and a disqualified person (4975(c)(1)(A)), the furnishing of goods or services between a plan and a disqualified person (4975(c)(1)(C)), the use by or for the benefit of a disqualified person of the income or assets of a plan (4975(c)(1)(D)) and an act by a disqualified person who is a fiduciary whereby he or she deals with the income or assets of a plan in his or her own interest or for his or her own account (4975(c)(1)(E)).

Section 4975(e)(2) of the Code defines the term "disqualified person" to include a plan fiduciary and a person providing services to a plan.

With respect to purchases and sales of PSFS stock in the open market in the manner described above, we note that the ERISA Conference Report states that:

> In general, it is expected that a transaction will not be a prohibited transaction (under either the labor or tax provisions) if the transaction is an ordinary "blind" purchase or sale of securities through an exchange where neither buyer nor seller (nor the agent of either) knows the identity of the other party involved. [H.R. Rep. 93-1280, 93d Cong., 2d Sess., 307 (1974)].

Based on your facts and representations, it is the opinion of the Department that purchases and sales of PSFS stock by PSFS (through its discount brokerage service) on the national over-the-counter market system on behalf of the participants of its self-directed IRA and Keogh accounts do not constitute transactions described in section 4975(c)(1)(A) and (D) of the Code.

Moreover, it appears that PSFS does not have the authority, control or responsibility to cause the IRA and Keogh accounts for which it serves as custodian or trustee to engage in purchases and sales of PSFS stock. Accordingly, it is our view that the purchases and sales of PSFS stock upon the written directions of plan participants would not constitute a violation of section 4975(c)(1)(E) of the Code.[2]

[2] We assume for purposes of this ruling that PSFS as trustee or custodian has no authority or responsibility to vote or otherwise deal with the PSFS stock held by its self directed IRA and Keogh accounts.

We note that you have not requested and consequently the Department is not offering an opinion regarding the provision of brokerage services by PSFS to the PSFS Keogh or IRA plans through its discount brokerage service.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure describes the effect of advisory opinions.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations