U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

AUG 17 1988

88-11A
Sec. 408(b)(8), 406(b)

Mr. Donald S. Kohla
King & Spalding
2500 Trust Company Tower
Atlanta, GA 30303

Re: SunTrust Banks, Inc.
Identification Number: F-3682A

Dear Mr. Kohla:

This is in response to your request for an advisory opinion on behalf of SunTrust Banks, Inc. (SunTrust) under section 406(b) of the Employee Retirement Income Security Act of 1974 (ERISA). In particular, you request an opinion that a bank in the SunTrust system would not violate section 406(b) of ERISA by investing the assets of employee benefit plans for which such bank is a fiduciary in a common trust fund maintained by such bank or any other bank in the SunTrust system.

You represent that SunTrust is a Georgia bank holding company which currently owns three bank holding companies in Georgia, Florida and Tennessee. Each of these holding companies owns banks which can act as fiduciaries for plans and which can maintain common trust funds for the collective investment of the assets of such plans.

Some of the banks in the SunTrust system currently maintain common trust funds for the collective investment of the assets of plans for which that bank or another bank in the SunTrust system is the trustee. Such funds have been subject to the fee restriction set forth in 12 CFR 9.18(b)(12) of the Comptroller of the Currency's (the Comptroller) regulations,[1] and will be referred to in this letter as standard fee funds. You represent that the Comptroller recently waived the fee restriction set forth in such regulation for banks in the SunTrust system which maintain

[1] Briefly, this regulation provides that the fee charged for a plan to participate in a common trust fund, when added to all other fees charged to such plan, cannot exceed the total fee which would have been charged if no assets of that plan had been invested in such common trust fund.

common trust funds in accordance with the conditions the Comptroller set for that waiver, and this letter will refer to funds established in accordance with that waiver as premium fee funds.

SunTrust proposes that one or more banks in the SunTrust system establish premium fee funds in which plans may participate. The fee for participation in a premium fee fund will be set forth in a fee schedule, and that fee schedule presumably will change from time to time.[2] You represent, for purposes of this letter, that the fee for participating in a premium fee fund, as well as the total fees received by the trustee bank for services to a plan,[3] will be "reasonable" under the circumstances, although SunTrust contemplates that such premium fee will be higher than the fee for participating in standard fee funds. The fee for participating in a premium fee fund will be paid to the bank in the SunTrust system which is the trustee for the plan which participates in the premium fee fund. The trustee bank will compensate the bank in the SunTrust system which maintains the premium fee fund for the investment services which the fund sponsor provides to the premium fee fund.

SunTrust is concerned that a bank in the SunTrust system which exercises any of the authority which makes it a fiduciary to cause a plan to invest in a premium fee fund might be viewed as engaging in a violation of section 406(b) of ERISA. Accordingly, SunTrust proposes to establish special conditions for making an investment in a premium fee fund, and these conditions would be designed to make the plan's sponsor or independent investment manager responsible for all investment decisions regarding a plan's participation in such fund.

Therefore, you represent that a plan will participate in a premium fee fund only under the following conditions--

(1) The investment will be made by the trustee bank only in accordance with a written standing direction or other written direction from the plan's sponsor or independent investment manager.[4]

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[2] You represent that all management fees are calculated as a percentage of the assets under management.

[3] In this regard, we assume that if any portion of the fee for participating in a premium fee fund is retained by the trustee bank, such portion represents reasonable compensation solely for trustee services performed by the trustee bank with regard to the plan monies transferred to the premium fee fund and any direct costs which may be incurred by the trustee bank in such transfer.

[4] We assume that such direction will specify the particular premium fee fund in which the plan will invest. We also assume that neither the plan's sponsor nor the investment manager providing written direction is the trustee bank or any other bank in the SunTrust system.

(2) A standing direction will specify the specific dollar amount of each contribution delivered to the trustee bank (or the exact procedure which the trustee bank will follow to determine a specific dollar amount) which the trustee bank shall invest in a premium fee fund.

(3) Any direction other than a standing direction will specify the specific dollar amount (or the exact procedure which the trustee bank will follow to determine a specific dollar amount) to be invested by the trustee bank in the premium fee fund.

(4) Each trustee bank will publish that particular trustee bank's procedure for each plan's sponsor or independent investment manager to direct such trustee bank to invest a plan's assets in a premium fee fund. Such procedure will specify a deadline for the delivery of amounts to the trustee bank for investment in a premium fee fund. Any such deadline will reflect the lead time, if any, which such trustee bank needs in order to effect a direction to invest in a premium fee fund on a transaction date.[5] Amounts delivered to the trustee bank on or before such a deadline will be invested in the premium fee fund on the transaction date which coincides with or which immediately follows such deadline, and amounts delivered after one such deadline, automatically will be treated as delivered before the immediately following deadline.

(5) If an amount is delivered to a trustee bank for investment in a premium fee fund before the deadline to effect a direction to invest such amount on a transaction date, the standing direction or other direction will specify how the trustee bank shall temporarily invest such amount pending such investment.[6]

(6) All plans which invest in a premium fee fund on a transaction date or withdraw from a premium fee fund on a transaction date will be treated exactly the same regardless of the time of day that the investment or withdrawal actually is made. For example, the trustee bank's fee will be exactly the same and the value of a unit in the premium fee fund will be exactly the same regardless of the time of day that the investment or withdrawal actually is made on a particular transaction date.

(7) The trustee bank will set forth the fee for participating in each premium fee fund in a fee schedule and, further, will give each affected plan's sponsor or independent

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[5] All funds will specify the date or dates on which investments can be made in such fund and withdrawals can be made from such fund, and each such date will be referred to in this letter as a transaction date.

[6] You have not asked us to address the prohibited transaction implications of such temporary investments, and, accordingly, we have not considered that issue for purposes of this response.

investment manager notice of any change in such fee schedule no less than 30 days prior to the fee change taking effect during which 30 day period that person will be given an opportunity to direct a withdrawal from the premium fee fund for which the fee is to be changed.

(8) A standing direction and any other direction will state that a plan's investment in a premium fee fund can be withdrawn only at the express written direction of such plan's sponsor or independent investment manager.

(9) Each trustee bank will publish that particular trustee bank's procedure for each plan's sponsor or independent investment manager to direct such trustee bank to withdraw a plan's assets from a premium fee fund. Such procedure will specify a deadline for the delivery of a direction to the trustee bank to make a withdrawal from a premium fee fund. Any such deadline will reflect the lead time, if any, which such trustee bank needs in order to effect such a direction. A withdrawal direction which is delivered to the trustee bank on or before such deadline will be effected on the transaction date which coincides with or immediately follows such deadline, and each withdrawal direction which is delivered after one such deadline automatically shall be treated as delivered before the immediately following deadline.

(10) SunTrust fully intends and expects that all withdrawals from premium fee funds will be made on the transaction date for which a withdrawal direction is timely delivered to the trustee bank in accordance with the trustee bank's published procedure for directing withdrawals. However, in the unlikely event that a directed withdrawal for a plan is not made for any reason (except a prohibition on a withdrawal under applicable law) on such transaction date, the fee for such plan to participate in the premium fee fund for the period which begins on such transaction date and ends on the transaction date such plan's assets actually are withdrawn from the premium fee fund shall be waived.

(11) A standing direction can be modified or withdrawn by a Plan's sponsor or independent investment manager without any additional fee or charge at any time.

(12) Copies of the premium fee fund documents will be made available to any plan's sponsor or independent investment manager upon request.

Section 406(a) of ERISA provides, in relevant part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest, or a transfer to, or use by or for the benefit of, a party in interest,

of any assets of the plan. In addition, section 406(b) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of the plan for his own interest or for his own account, or from acting in his individual or in any other capacity in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

Section 3(14) of ERISA defines the term party in interest to include a fiduciary and a person providing services to a plan. The banks in the SunTrust system which act as plan trustees are fiduciaries of those plans, under section 3(21) of ERISA, and therefore, parties in interest under section 3(14)(A) of ERISA. The bank(s) which sponsor the premium fee fund(s) would become fiduciaries and parties in interest with respect to those plans which invest in their fund(s).

Section 408(b)(8) of ERISA provides, in pertinent part, that the prohibitions of section 406(a)(1) of ERISA will not apply to any transaction between a plan and a common or collective trust fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency if (a) the transaction is a sale or purchase of an interest in the fund; (b) the bank or trust company receives not more than reasonable compensation; and (c) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank or trust company or an affiliate thereof) who has authority to manage and control the assets of the plan. In the absence of regulations, the Department is not prepared at this time to indicate whether section 408(b)(8) applies to transactions described in section 406(b) of ERISA. (See Proposed Class Exemption for Certain Transactions Involving Bank Collective Investment Funds, 44 FR 44291, n-3, July 27, 1979.)

In this regard, you have not requested an opinion that the proposed investment by plans in premium fee funds maintained by banks in the SunTrust system complies with the requirements of section 408(b)(8) of ERISA. As a general matter, whether the requirements of this section are met in each case involves questions which are inherently factual in nature. The Department ordinarily does not issue opinions on such matters. (See section 5.01 of ERISA Advisory Opinion Procedure 76-1, 41 FR 36281, April 27, 1976.)

While regulations under section 406(b) of ERISA have not been issued, the regulations under section 408(b)(2) [29 CFR 2550.408b-2(e)], provide that a fiduciary does not engage in an act described in section 406(b)(1) if the fiduciary does not use any of the authority, control or responsibility which makes that person a fiduciary to cause a plan to pay additional fees for a service furnished by the fiduciary or to pay a fee for a service furnished by a person in which the fiduciary has an interest which may affect the exercise of the fiduciary's best judgment as a fiduciary.

You represent that a plan's investment in a premium fee fund or withdrawal from such fund will only be made in accordance with written directions from the plan's sponsor or independent investment manager. Furthermore, each written direction will specify the specific dollar amount or contain a nondiscretionary procedure which the bank will follow to determine the amount to be invested or withdrawn from a fund. In addition, each bank's written procedures will specify the date or dates on which investments can be made in such fund, and withdrawn from such fund. Although the bank which maintains a fund may unilaterally change the fees charged for investments in the fund, you represent that the plan sponsor or independent investment manager of each plan will be informed of any change in the fee in writing at least 30 days before that change in fee takes effect during which time that person will be given an opportunity to direct a withdrawal from the fund.

In the circumstances you describe, it appears that a bank trustee would not be exercising any of the authority, control or responsibility that makes it a fiduciary to cause a plan to pay an additional fee. Thus, the investment of plan assets in the funds in those circumstances would not violate section 406(b)(1) of ERISA. Moreover, it is also the Department's view that, generally, a bank trustee's mere investment of plan assets in a premium fee fund pursuant to the arrangement described above would not cause the trustee bank to use any of the authority, control, or responsibility that makes it a fiduciary with regard to that investment and, thus, would not cause such bank to engage in a transaction that is prohibited under section 406(b)(2) of ERISA.

We wish to point out that ERISA's general standards of fiduciary conduct would apply to the proposed arrangement. Section 404(a)(1)(B) of ERISA requires that a fiduciary discharge his duties with respect to a plan solely in interest of the participants and beneficiaries, and with the care, skill, 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 a like character and with like aims. Accordingly, the plans' fiduciaries must act "prudently" and "solely in the interest" of the plans' participants and beneficiaries when causing the plans to enter into the proposed arrangement, as well as in deciding whether to continue such arrangement.

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

Sincerely,

Robert J. Doyle
Acting Director of Regulations and Interpretations