

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



JUL 14 1989

89-12A
Sec. IRC 4975(c)(1)(F)

Mr. David M. Rosenberger
Dykema Gossett
Suite 3000
505 North Woodward Avenue
Bloomfield Hills, Michigan 48013

RE: Identification Number: F-3960A

Dear Mr. Rosenberger:

This is in response to your letter of August 5, 1988 to the Department of Labor (the Department) requesting an advisory opinion on behalf of National Bank (the Bank) under section 4975 of the Internal Revenue Code of 1986 (the Code).

You represent that, as one of its services, the Bank offers an individual retirement account (IRA) program to its customers. The Bank serves as custodian for each IRA. The IRA customer directs all investments.¹ Under the IRA Program, the customer may choose between two investment alternatives: (1) savings accounts and certificates of deposit offered by the Bank, or (2) securities purchased through a discount brokerage subsidiary of the bank holding company that owns the Bank.

In the normal course of its business, the Bank also offers checking account services to its customers at a charge of \$3.00 per month for the compilation of monthly statements of account, a \$0.36 processing fee for each debit transaction concerning the customer's account, and a \$0.26 processing fee for each automated teller machine transaction. Any customer who maintains a minimum monthly checking account balance of \$499 or an average monthly balance of \$999 is not charged any fees by the Bank for checking account services (other than for those transactions effected at automated teller machines not located at a Bank facility).

¹ In this regard, we note that the Master Plan document appears to permit the Bank, under certain circumstances, to exercise the type of discretionary authority or control described in section 4975(e)(3) of the Code.

You indicate that the Bank proposes to amend its rules of deposit governing checking accounts to provide that any checking account customer who maintains an IRA with the Bank, and who causes such IRA to invest at least \$2,000 in financial products offered by the Bank, will not be charged by the Bank for any checking account services (other than automated teller transactions at non-Bank facilities). You further indicate that the rate of interest payable with respect to financial products purchased by an IRA will not change based upon whether or not a customer maintains a checking account with the Bank.

In effect, you have asked for an advisory opinion that the receipt of "free checking" account services by a customer who directs his IRA to invest \$2000 in Bank financial products will not constitute a prohibited transaction within the meaning of section 4975(c)(1) 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 Employee Retirement Income Security Act of 1974 (ERISA) over those individual retirement accounts (IRAs) described in section 408(a) of the Code which comply with the provisions of that section of the regulations.² 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 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 for which the Bank serves as custodian, references to specific sections of the Code in this letter shall also refer to corresponding sections of ERISA.

Section 4975(c)(1) of the Code prohibits, in relevant part, the use by or for the benefit of a disqualified person of the income or assets of a plan (4975(c)(1)(D)), an act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account (4975(c)(1)(E)), and the receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan (4975(c)(1)(F)).

² 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.

Section 4975(e)(1) of the Code, in part, defines the term plan to include an IRA described in section 408(a) of the Code. Section 4975(e)(2) of the Code defines the term disqualified person to include a fiduciary and a person providing services to the plan.

Section 4975(e)(3) of the Code defines the term fiduciary, in part, to include any person who exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets.

Each customer who establishes an IRA under the Bank's above-described program is a fiduciary and, thus, a disqualified person with respect to his IRA because of his authority under the IRA to direct investments.

Accordingly, it is the opinion of the Department of Labor that the receipt of "free checking" account services by a customer in connection with the investment of IRA assets in Bank financial products would constitute a violation of section 4975(c)(1) of the Code.

We note that you have not requested and consequently the Department is not offering an opinion regarding the provision of discount brokerage services by the Bank to the IRAs or the investment of any IRA assets in any particular Bank financial product.

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
Director of Regulations and Interpretations