



November 24, 1992

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1625 Massachusetts Avenue, NW
Suite 600
Washington, D.C. 20036

92-25A
ERISA SEC.
406(a)

Re: Identification Number C-9116

Dear Ms. Giammichele:

This is in response to your letters of March 13, and June 11, 1992, in which you request an advisory opinion regarding Prohibited Transaction Exemption 81-8 (PTE 81-8) (46 FR 7511, January 23, 1981) as amended (50 FR 14043, April 9, 1985). Specifically, your request concerns the condition set forth in section III(H)(3) of PTE 81-8 regarding the furnishing of financial statements to a plan.

You represent that the Sheet Metal Workers' Local Union No. 100, Washington, DC Area Health Benefit Plan (the Plan) is an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA). The Plan is negotiating a repurchase agreement with Maryland National Bank (the Bank). The Bank is a subsidiary of MNC Financial, Inc. (Parent Corporation). You further represent that a separate audited financial statement is not maintained for the Bank, but the Bank's financial condition is disclosed as part of the audited, consolidated financial statement of the Parent Corporation.

Finally, you have stated that it is your understanding that there are federal regulatory and statutory provisions that require a bank holding company to maintain the safety of its subsidiary banks. In this regard, it is your understanding that 12 CFR section 225.4 generally requires that bank holding companies maintain their subsidiary banks in a safe and sound manner.

You ask our opinion whether furnishing the Parent Corporation's annual audited and quarterly unaudited financial statement and the Bank's Call Report to the Plan complies with the requirements of section III(H)(3) of PTE 81-8.¹

PTE 81-8 provides, in pertinent part, that the restrictions in section 406(a)(1)(A), (B) and (D) of ERISA, and taxes imposed by reason of section 4975(c)(1)(A), (B) and (D) of the Code shall not apply to an investment of employee benefit plan assets which involves the purchase or other acquisition, holding, sale, exchange or redemption by or on behalf of an employee benefit plan of.. .

[a] repurchase agreement (or securities or other instruments under cover of a repurchase agreement) in which the seller of the underlying securities or other instruments is a bank which is supervised by the United States or a State; a broker-dealer registered under the Securities Exchange Act of 1934; or a dealer who makes primary markets in securities of the United States government or any agency thereof of in bankers acceptances and reports daily to the Federal Reserve Bank of New York its position with respect to these obligations, if each of the following conditions are satisfied.

Your request concerns the condition stated in section III(H)(3) of PTE 81-8 which provides that:

The seller agrees to furnish the plan with the most recent available audited statement of its financial condition as well as its most recent available unaudited statement, agrees to furnish additional audited and unaudited statements of its financial condition as they are issued and either: (A) agrees that each repurchase agreement transaction pursuant to the agreement shall constitute a representation by the seller that there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the plan fiduciary with whom such written agreement is made; or (B) prior to each repurchase agreement transaction, the seller represents that, as of the time the transaction is negotiated, there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the plan fiduciary with whom such written agreement is made.

The preamble to PTE 81-8 states that the purpose of the condition in PTE 81-8 relating to the furnishing of financial statements is to assure that plan officials entering into repurchase agreement transactions have access to information that is necessary to evaluate the transaction, and to assure that other interested parties can assess the propriety of a plan's short term investment activities.² Thus, this condition contemplates the provision of financial statements from which plan officials can determine the financial condition of the party who is responsible for carrying out the obligations under the agreement.

You have stated that separate audited financial statements are not maintained for the Bank. In addition, it does not appear, from the information that you have provided this office, that the Parent Corporation guarantees the liabilities of the Bank with respect to repurchase agreements.

Thus, the Department is unable to conclude that the provision of the Parent Corporation's annual audited and quarterly unaudited financial statement and the Bank's Call Report to the Plan would comply with the requirements of section III(H)(3) of PTE 81-8.

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

Sincerely,

Ivan L. Strasfeld
Director
Office of Exemption Determinations

'The Bank's Call Report (Consolidated Report of Condition and Income for Banks with Domestic and Foreign Offices), is an annual report which is filed with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency.

²
See 46 FR 7511, 7514 (January 23, 1981).