

**U.S. Department of Labor**

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



Reply to the Attention of:

Ivan Strasfeld  
(202) 523-7901

OPINION LETTER 82-24A  
Sec. IRC 4975(c)(1)(A), (B), & (E), IRC 4975(e)(3)(A)

JUN 4 1982

Mary L. Burton, Assistant Vice President  
Tax Benefit Account Manager  
Home Federal Savings and Loan Association  
Post Office Box 2871  
Tucson, Arizona 85702

Re: Identification Number: F-2033

Dear Ms. Burton:

By letter dated July 14, 1981, and telephone conversation of August 14, 1981, Ms. Joyce Green of your office requested clarification regarding the effect of section 4975 of the Internal Revenue Code of 1954 (the Code) on investments by employee benefit plans in the "High Yield Plan" sponsored by the Home Federal Savings and Loan Association (Home Federal).

Representations made in the letter state that the High Yield Plan is a repurchase agreement adopted by Home Federal in connection with Memorandum #R 51 issued by the Federal Home Loan Bank Board. Individual retirement account plans and Keogh plans desiring to invest in the High Yield Plan must designate Home Federal as plan trustee.

Documents accompanying your letter indicate, in relevant part, that the repurchase agreement is an obligation evidencing an indebtedness of Home Federal arising from the transfer of securities issued by, or fully guaranteed by, the United States government. The obligation is not a savings account or deposit and is neither insured by the Federal Savings and Loan Insurance Corporation nor guaranteed by the United States government. The obligation must mature in less than 90 days. Repurchases of the obligation by the issuing institution will be met from the institution's general funds and not from funds raised by the sale of the underlying securities.

You request our clarification whether the offering by Home Federal of its High Yield Plan as an investment alternative to individual retirement account plans and Keogh plans for which it serves as trustee would cause the plans to be disqualified under section 4975 of the Code.

Section 4975(c)(1)(A) and (B) of the Code prohibit a direct or indirect sale or exchange, or leasing, of any property between a plan and a disqualified person; or a lending of money or other extension of credit between a plan and a disqualified person. In addition, section 4975(c)(1)(E) of the Code prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account.

The term "disqualified person" is defined in section 4975(e)(2) of the Code to include, in relevant part, a fiduciary and a person providing services to a plan. A "fiduciary" is defined in Code section 4975(e)(3)(A) to mean, in pertinent part, any person who exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets. The form of individual retirement trust account and the summary plan description which you submitted with your opinion request indicate that Home Federal, as trustee, will invest and reinvest the assets of the individual retirement accounts and Keogh plans that you describe. Therefore, it appears that Home Federal is a fiduciary with respect to those individual retirement account plans and Keogh plans for which it serves as trustee.

The Department believes that if Home Federal causes an employee benefit plan or individual retirement account for which it serves as trustee to enter into a repurchase agreement with Home Federal of the kind described in Memorandum #R 51 of the Federal Home Loan Bank Board it will have engaged in a prohibited transaction under section 4975(c)(1) of the Code.<sup>1</sup> However, the imposition of excise taxes under subsections 4975(a), (b) and the application of section 408(e)(2) of the Code (relating to the disqualification of an individual retirement account by reason of certain prohibited transactions) are matters solely within the jurisdiction of the Internal Revenue Service.

Under Reorganization Plan No. 4 of 1978, the Secretary of Labor has the authority to issue letters under Titles I and II of the Employee Retirement Income Security Act of 1974 (ERISA).

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<sup>1</sup> Section 4975(d)(4) of the Code provides an exemption from the prohibited transaction rules for certain plan investments in a bank or similar financial institution supervised by the United States or a State. However, the repurchase agreements described in your opinion request are not "deposits" within the meaning of that exemption. See Treas. Reg. §54.4975-6(b)(4)(iii). In addition, the Department has issued an administrative exemption from the prohibited transaction rules for the acquisition, holding or sale of a repurchase agreement, provided certain conditions are met, but this exemption is not available if the seller or any affiliate of the seller has any discretionary authority or control with respect to the investment of the plan assets involved in the transaction. See Prohibited Transaction Exemption 81-08, section III. F., 46 FR 7511, 7518 (January 23, 1981).

Accordingly, to the extent an employee benefit plan may be subject to the provisions of Title I of ERISA, the specific provisions of the Code mentioned above shall also refer to their corresponding sections of Part 4 of Title I of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

Sincerely,

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