U.S. Department of Labor

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

Reply to the Attention of:
Dan O'Neil
(202) 523-8368

OPINION NO. 82-41A
Sec. 408(b)(8), 406(b)(1), 408(a), PTE 80-51

AUG 12 1982

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Re: First Interstate Bancorp's Interbank Common Trust Fund System
Identification Number: F-1744A

Gentlemen:

This is in response to your letters of November 24, 1980, April 15, and July 24, 1981, in which you request, on behalf of First Interstate Bancorp (FIBCorp), formerly Western Bancorporation, and its subsidiary banks, an advisory opinion concerning (1) the availability of the prohibited transaction exemption contained in section 408(b)(8) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(d)(8) of the Internal Revenue Code of 1954 (the Code) for fund-to-fund investments by pooled funds maintained by a bank and (2) the availability of the class exemption for bank collective investment funds (Prohibited Transaction Exemption 80-51 (PTE 80-51), 45 FR 49709, July 25, 1980) for certain transactions of a pooled fund in which another pooled fund has invested.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713; October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

You represent that FIBCorp is a multibank holding company registered with the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956. FIBCorp has 22 subsidiaries (FIBCorp affiliate banks) located in eleven western states. Ten of these banks are state chartered and twelve are national banking associations. All of these subsidiaries qualify as "affiliates" under section 1504(a) of the Code, and are subject to

regulation by the Federal Deposit Insurance Corporation as well as various other Federal and state regulatory bodies. First Interstate Bank of California (FIBCal), a subsidiary bank of FIBCorp, currently maintains six "pooled funds" for the collective investment of assets of employee benefit plans qualified under section 401 of the Code. The six pooled funds are maintained under a single declaration of trust, entitled the First Interstate Bank of California Investment Trust for Employee Benefit Plans (FIBCal Trust), and consist of an Equity Fund, a Fixed Income Fund, a Short-Term Income Fund, a Government Bond Fund, a Western Technology Fund and a Real Estate Fund.

Similarly designated funds are maintained by each of the FIBCorp affiliate banks and have been created solely to make fund-to-fund investments in corresponding FIBCal pooled funds.

Your request for an advisory opinion contemplates two types of fund-to-fund investments. The first would consist of the investment of assets by a pooled fund maintained by a FIBCorp affiliate bank in the corresponding pooled fund maintained by FIBCal. The second type of investment would involve the transfer of assets by one pooled fund maintained by FIBCal to another FIBCal pooled fund. Investments of the second type are limited to the Equity, Fixed Income, Short-Term Income and Government Bond Funds. No fund-to-fund investments by FIBCal pooled funds would be permitted in the FIBCal Real Estate Fund or the Western Technology Fund.

A plan would commence its participation in a FIBCal pooled fund by investing in units of participation in a pooled fund of a FIBCorp affiliate bank. Sales and purchases of interests in the funds would be permitted only on a valuation date. Valuation dates for the FIBCorp affiliate banks' pooled funds are the same as for their corresponding FIBCal pooled funds. The valuation dates for all of the FIBCal funds except the Short-Term Income Fund and the Real Estate Fund are the last day of each month. Every business day is a valuation date for the Short-Term Income Fund. The Real Estate Fund has a valuation date on the last day of March, June, September and December. Following the investment by the plan in a FIBCorp affiliate bank pooled fund, that fund would immediately invest in an equivalent number of participation units in the corresponding FIBCal pooled fund.

A plan would redeem its participation in the FIBCal pooled fund in the same manner. The plan would direct the FIBCorp affiliate bank's pooled fund to redeem a certain number of units of participation. The FIBCorp affiliate bank's pooled fund would then redeem an equivalent number of units of participation from its corresponding FIBCal pooled fund. The FIBCal pooled fund would remit the proceeds of the redemption to the FIBCorp affiliate bank's pooled fund which, in turn, would transfer the proceeds to the plan. FIBCal may require up to five day's notice for requests for admission or withdrawal in the case of all FIBCal pooled funds except the Short-Term Income Fund, which requires no notice, and the Real Estate Fund, which may require a year's notice.

Prior to participation by an employee benefit plan in the FIBCal Trust, there would be negotiation and agreement between an independent third party such as the sponsoring employer or an administrative committee and a FIBCorp affiliate bank regarding the extent of services to be provided to the plan, the amount of investment discretion given to the bank, the identity of the FIBCal pooled funds in which investments would be made and the fee schedule that would be applicable. The instruments governing the pooled funds maintained by FIBCal and FIBCorp affiliate banks require specific authorization in the plan documents or by an independent third party prior to the plan's investment in the FIBCal pooled fund system. Additionally, these instruments would authorize the pooled funds themselves to make and accept fund-to-fund investments.

The basic fee charged to a plan for the plan's investment in FIBCal pooled funds or FIBCorp affiliate bank's pooled funds (which are reinvested in the corresponding FIBCal pooled funds) would consist of an annual fee based on a percentage of the total plan assets invested in all funds (other than the Western Technology Fund and the Real Estate Fund, discussed below). The fee schedules typically provide for graduated rates that decrease proportionately as the amount invested increases. Except in the case of the Western Technology Fund and the Real Estate Fund, the fees charged to the participating plans would be the same regardless of the funds in which plan assets are invested. Neither FIBCal nor a FIBCorp affiliate bank would charge any additional fees for the individual investment or redemption transactions described above.[1] In addition to the basic fee structure, specific fees would also be charged, subject to the approval of each plan, for any additional individual services provided by a FIBCorp affiliate bank or by FIBCal to plans participating in the pooled funds. These fees would not be affected by fund-to-fund investments.

You further represent that the aggregate fees charged to a plan participating in this pooled fund system would not exceed, and probably would be less than, the fees that would be charged if none of the plan's assets were invested in a system which included fund-to-fund investments. In this respect, you note that a regulation of the Comptroller of the Currency, provides at 12 CFR 9.18(b)(12) that:

> A national bank administering a collective investment fund ... may charge a fee for the management of the collective investment fund provided that the fractional part of such fee proportionate to the interest of each participant shall not, when added to any other compensation charged by a bank to a participant, exceed the total amount of compensation which would have been charged to said participant if no assets of said participant had been invested in participations in the fund.

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[1] You also note that FIBCorp affiliate banks that are national banking associations are prohibited from charging admission or withdrawal fees to participants in collective investment funds. Section 9.5010 of the Comptroller's Precedents and Opinions, published in the Comptroller's Handbook for National Trust Examiners at E-1.

Restrictions equivalent to Section 9.18(b)(12) of the Comptroller's Regulations are also incorporated into the declarations of trust that would govern the FIBCal and FIBCorp affiliate banks pooled trust funds. These provisions would be enforced by state regulatory authorities examining FIBCal and the other FIBCorp affiliate banks that are state chartered.

In addition to the general authorization required for participation in the FIBCal pooled funds system, the FIBCal Real Estate Fund requires specific authorization from an independent party other than the banks before a plan may invest in this fund even under circumstances where the bank has full investment discretion. However, elsewhere in your submissions you suggest that an independent fiduciary may give "standing instructions" regarding investments in the Real Estate Fund. Participation in the fund is further limited to ten percent of a plan's assets, and no other FIBCal pooled fund would be permitted to invest in the Real Estate Fund. The annual fees chargeable to participating plans would be fully disclosed and would be based on a percentage of the market value of the plan's investment. If FIBCal itself performs the day-to-day management and/or leasing of properties for this fund, a fee "commensurate with (or less than) that customarily charged by agents for such services on similar properties in the particular locale" would be charged directly to the Real Estate Fund and thereby indirectly to each unit of participation.

Specific approval would also be required for plan's initial participation in the Western Technology Fund. Thereafter, investments may be made in the fund within the guidelines and subject to the limits imposed in the original agreement between the independent fiduciary and the affiliate bank. This fund would charge a flat annual fee based on a percentage of the market value of the units of participation owned by a plan. This would result in higher annual fees than for the funds charging graduated fees on larger investments. No other FIBCal pooled fund would be permitted to invest in the Western Technology Fund.

Both the fees charged with respect to the Real Estate Fund and the Western Technology Fund are separately computed as a percentage of the value of the plan's investment in each fund.

You request the following advisory opinions:

1. Fund-to-fund investments by FIBCorp affiliate bank pooled funds in corresponding pooled funds maintained by FIBCal and fund-to-fund investments by a FIBCal pooled fund in other FIBCal pooled funds would be exempt from the prohibited transaction provisions of section 406 of ERISA by reason of section 408(b)(8) of ERISA.

2. A pooled fund in which another pooled fund maintained by the same bank or an affiliate bank had invested would be permitted by PTE 80-51 to engage in transactions that were otherwise prohibited under section 406 and 407(a) of ERISA, so long as the conditions of that exemption are satisfied.

Section 406(a)(1)(A) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction which the fiduciary knows or should know constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest, and section 406(a)(1)(C) prohibits a fiduciary from engaging in a transaction if he knows or should know that the transaction constitutes the furnishing of goods, services, or facilities between the plan and a party in interest. In addition, ERISA section 406(a)(1)(D) prohibits a plan fiduciary from causing the plan to engage in a transaction if he knows or should know that the transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 406(b)(1) of ERISA further prohibits a plan fiduciary from dealing with the assets of the plan in his own interest or for his own account.

A "party in interest" is defined in section 3(14) of ERISA to include a fiduciary and a person providing services to a plan.

Section 408(b)(8) of ERISA provides, in pertinent part, that the prohibitions contained in section 406(a)(1) of ERISA shall not apply to any transaction between an employee benefit plan and a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency, if (1) the transaction is a sale or purchase of an interest in the fund, (2) the bank or trust company receives not more than reasonable compensation and (3) the 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 the 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 Funds, 44 FR 44290, 44291, n. 3, July 27, 1979.

On the basis of the information submitted, it is the view of the Department that fund-to-fund investments by FIBCorp affiliate bank pooled funds in corresponding FIBCal pooled funds and fund-to-fund investments by a FIBCal pooled fund in other FIBCal pooled funds are transactions involving the sale or purchase of an interest in a fund by an employee benefit plan and would be exempt from the prohibitions of section 406(a)(1) of ERISA if the conditions of section 408(b)(8) are met.

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) of ERISA 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.

Based on the representations contained in your submissions, it does not appear that FIBCal or a FIBCorp affiliate bank, as trustee of a pooled fund, would have the authority which makes it a fiduciary to cause a plan (either directly or through a pooled fund in which the plan has invested) to pay additional fees for the initial purchase of an interest in a pooled fund (other than the Western Technology Fund or the Real Estate Fund) or for the subsequent fund-to-fund investments involving such funds. Accordingly, assuming that the fiduciaries who approve a plan's participation in the program described in your submissions do not have an interest in FIBCorp, FIBCal or any other FIBCorp affiliated bank which may affect the exercise of their best judgment as fiduciaries, fund-to-fund investments by FIBCal and/or FIBCorp affiliate banks in those pooled funds would not, in and of themselves, involve acts described in section 406(b)(1) of ERISA. However, because a violation of section 406(b)(1) could occur in the course of the operation of the program, the Department is not prepared to state that the described arrangements, in operation, would, in no case, violate that section.

The Department is also not prepared to state that a plan's investment in the Real Estate Fund or the Western Technology Fund would not involve violations of section 406(b)(1) of ERISA. Although it appears that an independent plan fiduciary generally authorizes a plan's investment in these funds, it also appears that FIBCal (or the other FIBCorp affiliated bank involved) might exercise the authority and control which makes it a fiduciary with respect to specific decisions to invest in the funds. To the extent these specific investment decisions are made by FIBCal or a FIBCorp affiliated bank, the fees received by FIBCal with respect to its management of the funds will increase with the amount of plan assets allocated to such fund. Such investment decisions could be prohibited by section 406(b)(1) of ERISA. In addition, as noted above, the Department is not prepared to state whether 408(b)(8) would provide relief for such transactions.

With respect to your request for an advisory opinion regarding PTE 80-51, Section I(a)(1) of the class exemption provides in pertinent part that the restrictions of sections 406(a), 406(b)(2) and 407(a) of ERISA shall not apply to any transaction between a party in interest with respect to a plan and a collective investment fund maintained by a bank, and in which the plan has an interest, or any acquisition or holding by the collective investment fund of employer securities or employer real property, if the party in interest is not the bank that maintains the collective investment fund, any other collective investment fund maintained by the bank or any affiliate of the bank.

The preamble to PTE 80-51 (45 FR 49714) states, in part:

> A number of commentators stated that they read the proposed exemption to restrict the movement of assets from one collective investment fund to another since the language in section I(a)(1) suggests that a collective investment fund maintained by a bank is a party in interest with respect to any plan administered by a bank. This exemption is not intended to deal with transactions between collective funds unless one fund is a party in interest with respect to the plans participating in the other fund. Section I(a)(1) does not state that a bank collective investment fund is a party in interest with respect to any plan

> administered by a bank. Rather, it provides that the exemption is not available for a transaction with a party in interest if the party in interest is another collective investment fund maintained by the same bank or affiliate thereof.

Thus, the exemption would not be available for transactions involving a party in interest which is another collective investment fund maintained by the same bank or an affiliate. However, we are of the opinion that PTE 80-51 would permit a pooled fund (Fund A) in which another pooled fund (Fund B) maintained by the same bank or an affiliate bank had invested to engage in transactions with persons who are parties in interest with respect to a plan participating in Fund B, provided the conditions of the class exemption are satisfied.

Finally, we wish to note that we express no opinion regarding whether FIBCal's provision of day-to-day management services for real property owned by the Real Estate Fund for additional compensation would be encompassed by section 408(b)(8) of ERISA. Relief for these transactions, however, may be provided in section I(b)(3) of PTE 80-51.

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

Sincerely,

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