

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 83-12A

Sec. 408(a)
PTE 80-51

MAR 11 1983

Mr. Morton H. Zalutsky
Zalutsky & Klarquist, P.C.
1099 S.W. Columbia St.
Portland, Oregon 97201

Re: Capital Consultants, Inc.
Identification No: F-2073

Dear Mr. Zalutsky:

This is in response to your letters of August 5, 1981, December 21, 1981, and February 1, 1982, and your telephone conversations with Mr. Barry Newman of this office, requesting an advisory opinion concerning the availability of the Class Exemption for Certain Transactions Involving Bank Collective Investment Funds (PTE 80-51), 45 FR 49709, July 25, 1980.

You represent that Capital Consultants, Inc. (CCI) serves as investment manager [as defined in section 3(38) of the Employee Retirement Income Security Act of 1974 (ERISA)] for multiemployer and single employer benefit plans. Capital Trust, a wholly owned subsidiary of CCI, is a trust company subject to the supervision and examination of the Superintendent of Banks of the State of Oregon as a "financial institution".¹ Capital Trust has established the Plan of Operation for Real Estate Equity Fund II (the Fund), a group trust which has as its primary purpose the investment of employee benefit plan assets in real estate. Capital Trust is trustee for the Fund and CCI will serve as its investment manager.

In your letter of June 18, 1981, to the Internal Revenue Service, you stated that "Capital Trust's business consists of exercising fiduciary powers similar to those authorized to national banks by

¹ A "financial institution" is defined in ORS 706.005(13) to mean "a bank, a trust company or a savings bank."

the Comptroller of the Currency... The Fund is supervised by the Superintendent of Banks of the State of Oregon. It is maintained in conformity with the rules and regulations of the Comptroller of the Currency pertaining to the collective investment of trust funds by national banks.”

You have requested an advisory opinion concerning whether Capital Trust Company will be considered to be a “bank” for purposes of PTE 80-51 when it acts as trustee under a common trust fund established for investment by employee benefit plans.

PTE 80-51 provides an exemption for certain transactions entered into by “collective investment funds that are maintained by banks and in which employee benefit plans participate ...”.

Although the term “bank” is not defined in PTE 80-51, the term “collective investment fund” is defined in section IV(e) of the class exemption as a “common or collective trust fund or pooled investment fund maintained by a bank or trust company”. Moreover section M of the preamble to the class exemption provides, in part, that “(r)elief was granted for bank collective investment funds, among other reasons, because such funds are regulated by other governmental agencies...”.

The circumstances described in this case indicate that Capital Trust is regulated by the same state authority and in the same manner as state chartered banks. Therefore, it is the opinion of the Department that Capital Trust is a bank for purposes of PTE 80-51, when it maintains the Fund for the collective investment of employee benefit plan assets.

We wish to note that you have not requested, and the Department has not considered, whether an investment of plan assets in the Fund would be encompassed by the statutory exemption contained in section 408(b)(8) of ERISA or otherwise conforms to the general fiduciary responsibility provisions of section 404(a) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter 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