U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-26A
Sec. 402(a), 402(c)(1), 402(c)(3), 403(a),
405(c)(1), 405(c)(3), 405(d)(1)

MAY 26 1983

Frederick C. Kneip, Esq.
John H. Kelly, Esq.
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, New York 10005

Re: Frank Russell Trust Company
Real Estate Investment Account
Identification Number: F-2395A

Gentlemen:

This is in response to your letters of May 14, 1982, and February 1, 1983, on behalf of the Frank Russell Trust Company (the Trust Company), requesting an advisory opinion regarding the application of the fiduciary responsibility provisions of sections 402, 403 and 405 of the Employee Retirement Income Security Act of 1974 (ERISA) to the proposed establishment and subsequent investments of a real estate equity fund.

You represent that the Trust Company is a non-depository trust company organized under the banking laws of the State of Washington and, except for directors' qualifying shares, is wholly owned by the Frank Russell Company (the Advisor). The Trust Company has created a collective trust fund known as the Frank Russell Trust Company Commingled Employee Benefit Funds Trust (Commingled Trust) for the collective investment of the assets of employee benefit plans which meet the requirements of section 401(a) of the Internal Revenue Code of 1954 (the Code). The Commingled Trust is divided into a number of separate investment funds (Investment Funds) which now include a fixed income fund, a short term investment fund, an international securities fund and three equity funds.

In connection with an earlier request for an advisory opinion, you represented that the Trust Company desired to retain the Advisor as a consultant with respect to certain of the Trust Company's areas of responsibility, particularly concerning the choice of investment advisors to assist the Trust Company in managing plan assets. The Advisor would also make available to the Trust Company certain facilities useful in efficiently managing individual plan assets. The Trust Company, by retaining complete authority to accept or reject any advice from the Advisor, and by maintaining officers and appropriate staff to make these decisions, would not delegate any of its responsibilities to the Advisor. The services provided by the Advisor are within the

responsibilities of the Trust Company and do not add to those responsibilities. You also stated that payment by the Trust Company for the services rendered by the Advisor are made as a cost of doing business and do not result in client plans paying an additional fee to the Trust Company for its management services. The fee paid by the Trust Company is at the same rate as that paid by the Advisor's other clients.

In Advisory Opinion 80-59A (October 8, 1980), the Department stated that, to the extent that the Advisor's services were necessary for the operation of the plans and the arrangement met the requirements of 29 CFR §2550.408b-2, section 408(b)(2) of ERISA would permit the Advisor to perform the advisory services outlined. The Department further opined that, based on your representations, it did not appear that the Trust Company would exercise any of its fiduciary authority to benefit itself or the Advisor. Accordingly, the Department concluded that the appointment of the Advisor to provide consulting service did not appear to constitute an act in violation of section 406(b)(1) of ERISA.

The Trust Company now proposes to amend the Declaration of Trust for the Commingled Trust (the Declaration of Trust) to provide for an additional Investment Fund to be known as the Real Estate Equity Fund. This fund would invest primarily in entities, such as real estate investment trusts, closed-end commingled funds, real estate limited partnerships, commingled real estate funds operated by banks, and insurance company pooled separate accounts, which themselves invest in real estate or indirect interests in real estate. Neither the Trust Company nor the Advisor will have any affiliation with, or interest in, any sponsor or manager of these investment vehicles. Initially, the Real Estate Equity Fund does not intend to invest directly in fee simple or other direct or indirect interests in improved or unimproved real property. Subparagraph 5 of the Declaration of Trust provides that no more than 10% of the assets of any separate plan may be accepted for investment in the Real Estate Equity Fund.

Fiduciaries of benefit plans (Separate Plans) wishing to engage the Trust Company to manage and control plan assets designate the Trust Company as Trustee or Investment Manager of specified plan assets under either an Investment Management Agreement or a Trust Agreement. These agreements provide that assets transferred to the Trust Company, as investment manager or trustee, may be transferred by the Trust Company to itself as Trustee of the Commingled Trust for collective investment in one or more of the Investment Funds. As required by Revenue Ruling 81-100, the underlying trust agreement establishing the trust (Separate Trust) under a Separate Plan provides that, when trust assets are transferred to the Trust Company as Commingled Trust Trustee, the provisions of the Declaration of (Commingled) Trust constitute a part of the Separate Trust.

Assets transferred to the Commingled Trust are allocated to the Investment Fund or Funds which are intended to be utilized for the Separate Plan. In some instances, the Trust Company is given discretion to make the allocation among the Investment Funds. In other cases the plan fiduciary determines, with the consent of the Trust Company, the Investment Funds in which interests are to be acquired.

You further represent that certain of the securities intended for investment by the Real Estate Equity Fund may constitute interests in investment vehicles the underlying assets of which may

be regarded as including plan assets for purposes of the fiduciary responsibility provisions of ERISA. In that case, the entities which maintain the investment vehicles, for example, insurance companies managing pooled separate accounts or banks managing collective investment funds, may, as a result, be fiduciaries with respect to those assets of the Separate Plan invested in these vehicles through the Commingled Trust. Therefore, you propose that the Trust Agreements or Investment Management Agreements and the Declaration of Trust under which the Trust Company acts be amended to provide specific authorization for such types of investments and to identify the Trust Company as a named fiduciary of each Separate Plan with authority to designate any such entity which maintains or manages each such investment vehicle to which assets are to be transferred from the Real Estate Equity Fund as an investment manager or trustee of the Separate Plan with respect to the interest of the Separate Plan in the assets so transferred.

The types of investments as to which these fiduciary designations are likely to be made by the Trust Company are investments in pooled separate accounts of insurance companies and collective investment funds maintained by banks. However, other investment vehicles exist or may come into existence, such as certain types of closed-end commingled investment funds, with respect to which the question of the management of plan assets by a second fiduciary may also arise. It is intended that the authorization provided will be broad enough to empower the Trust Company to make any fiduciary designation required in order to permit the transfer of assets to any of these vehicles.

The following advisory opinions are requested:

> 1. That the Trust Company may act as a Trustee or Investment Manager of the Separate Plans, as Commingled Trust Trustee acting with respect to the Real Estate Equity Fund, and as named fiduciary with respect to the Separate Plans with authority to designate as investment manager or trustee under ERISA, the managers or trustees of real estate investment vehicles in which the Commingled Trust Trustee invests on behalf of the Real Estate Equity Fund.
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> 2. That the Trust Company may, in the exercise of the powers granted to it as Trustee or Investment Manager, Commingled Trust Trustee and named fiduciary, (i) transfer assets from a Separate Plan to the Commingled Trust for the purpose of investment in the Real Estate Equity Fund and vice versa; (ii) transfer assets from other Investment Funds under the Commingled Fund to the Real Estate Equity Fund and vice versa; (iii) invest assets of the Real Estate Equity Fund in interests in investment vehicles, the assets of which do not constitute plan assets for purposes of ERISA; (iv) invest assets of the Real Estate Equity Fund in investment vehicles, the assets of which constitute plan assets for purposes of ERISA and to designate the manager or trustee of such vehicles as an investment manager or trustee of the assets of the Real Estate Equity Fund which are so invested; and (v) determine the portion of the assets of the Real Estate Equity Fund which is to be invested in each of the categories of investment vehicles described in (iii) and (iv) above.

Section 402(a)(1) of ERISA provides that every employee benefit plan shall be established and maintained pursuant to a written instrument which shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and

administration of the plan. The term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary by a person who is an employer or employee organization with respect to the plan or by an employer and an employee organization acting jointly.

Section 402(c)(1) of ERISA states that any employee benefit plan may provide that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including services both as trustee and administrator). Section 402(c)(3) states that an employee benefit plan may provide that a person who is a named fiduciary with respect to control or management of the assets of a plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan. Section 3(38) of ERISA defines the term “investment manager” to mean any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2))

(A) who has the power to manage, acquire, or dispose of any assets of a plan;

(B) who is (i) registered as an investment adviser under the Investment Advisers Act of 1940; (ii) is a bank, as defined in that Act; or (iii) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

Section 403(a) of ERISA provides that, with certain exceptions not here relevant, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) of ERISA or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that -

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3) of ERISA.

Section 405(c)(1) of ERISA provides that the instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan. Section 405(c)(3) of ERISA provides that the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3).

Based on your representations, we have concluded that, upon designation under the Investment Management Agreement or Trust Agreement described above, nothing contained in sections 402, 403 and 405 of ERISA would preclude the Trust Company from acting as a Trustee or Investment Manager of the Separate Plans and, as Commingled Trust Trustee with respect to the Real Estate Equity Fund.

You have likewise represented that, where certain of the securities intended for investment by the Real Estate Equity Fund constitute interests in investment vehicles the underlying assets of which may be regarded as including plan assets, you propose that the Trust Agreement or Investment Management Agreement and the Declaration of (Commingled) Trust be amended to provide specific authorization for such types of investments and to name the Trust Company as a fiduciary of each Separate Plan. As a named fiduciary of the Separate Plan, the Trust Company would have the authority, under sections 402(c)(3) and 403(a) of ERISA, to name the managers or trustees of the investment vehicles as trustee or investment manager of the Separate Plan.

Therefore, we have concluded that, if the proposed amendments are made, under sections 402, 403 and 405 of ERISA the Trust Company may act as named fiduciary with respect to the Separate Plans with authority to designate as trustees or investment managers of the Separate Plans the managers or trustees of real estate investment vehicles in which the Commingled Trust Trustee invests on behalf of the Real Estate Equity Fund.

We would point out that section 405(d)(1) of ERISA provides, in pertinent part, that, if an investment manager or managers have been appointed under section 402(c)(3), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager. Similar exculpatory language is not found in that portion of section 403(a) concerning the appointment of trustees by a named fiduciary. Therefore, even if a named fiduciary appoints a trustee or trustees, the named fiduciary is not relieved of any of its potential fiduciary liability under ERISA as a result of such (trustee) appointment.

Article Third of the Basic Trust Agreement between Frank Russell Trust Company and the Plan Sponsor provides, in pertinent part, that the Trust Company may invest and reinvest all or a portion of a Separate Trust collectively with funds of other Separate Trusts through the medium of one or more of the Investment Funds of the Commingled Trust. Article Second, Section C, of the Commingled Trust provides that the assets of any Investment Fund may be invested in any other Investment Fund in the discretion of the Trust Company. This section also provides that the Trust Company's determination as to whether or not any investment is within the class or classes of property in which any Investment Fund is to be invested is conclusive.

Therefore, we have also concluded that nothing in sections 402, 403 and 405 of ERISA would prohibit the Trust Company, in the exercise of the powers granted to it as Trustee or Investment Manager, Commingled Trust Trustee and named fiduciary, from (i) transferring assets from a Separate Plan to the Commingled Trust for the purpose of investment in the Real Estate Equity Fund and vice versa; (ii) transferring assets from other Investment Funds under the Commingled Fund to the Real Estate Equity Fund and vice versa; (iii) investing assets of the Real Estate

Equity Fund in interests in investment vehicles, the assets of which do not constitute plan assets for purposes of ERISA; (iv) investing assets of the Real Estate Equity Fund in investment vehicles, the assets of which constitute plan assets for purposes of ERISA and designating the manager or trustee of such vehicles as an investment manager or trustee of the assets of the Real Estate Equity Fund which are so invested; and (v) determining the portion of the assets of the Real Estate Equity Fund which is to be invested in each of the categories of investment vehicles described in (iii) and (iv) above. However, none of these transactions will operate to relieve the Trust Company of liability under section 403, 404 and 405 except to the extent provided in section 403(a)(1) (relating to directed trusts), 403(a)(2) and 405(d) (relating to delegations to investment managers).

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure explains the effect of advisory opinions. This opinion is concerned with sections 402, 403 and 405 of ERISA and not with any other fiduciary responsibility sections. For example, we have not considered the implications of the proposed transactions under the prohibited transaction rules of ERISA, and nothing in this letter should be construed as implying that the Department believes that the arrangements described in your opinion request would be consistent with those rules. Specifically, the Department expresses no opinion whether the allocation of plan assets among the investment funds of the Trust Company would violate section 406 of ERISA.

Sincerely,

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