

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 83-29A
Sec. 408(b)(2), 406(b)(1)

JUN 13 1983

Edwin H. Perry, Esquire
Greenebaum, Doll & McDonald
3300 First National Tower
Louisville, Kentucky 40202

Identification Number: F-1760A

Dear Mr. Perry:

This is in response to your letters of December 9, 1980 and April 22, 1982, in which you request an advisory opinion under section 406 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(c) of the Internal Revenue Code of 1954 (the Code). You specifically request an opinion that Shelby County Trust Bank (the Bank) may retain SMC Advisors, Inc. (SMC) to perform investment management and record keeping services for the Bank in the Bank's capacity as trustee for various employee benefit plans whose assets are held by the Bank in the Shelby County Trust Bank Common Trust Fund (the common fund).

You represent that the Bank is chartered under the laws of the Commonwealth of Kentucky and is authorized to conduct trust business. The common fund, which is to hold and invest assets of various employee benefit plans, has been approved by the Department of Banking and Securities of Kentucky. The Bank and SMC are related corporations through a 30 percent common ownership of stock and a 49 percent common ownership of voting control. However, they are not brother-sister corporations within the meaning of section 1563 of the Code. SMC will not offer comparable investment and record keeping services to any other bank or trustee.

At the present time, the Bank is not a trustee of any employee benefit plans. However, in the future the Bank contemplates becoming trustee of only those employee benefit plans whose assets will be invested in the common fund. To assist the Bank in managing the assets in the common fund, SMC has been retained to provide the Bank with investment management and related record keeping services with respect to moneys and other property of the common fund. You further represent that the services which would be provided by SMC are to be a primary feature of the fiduciary services offered by the Bank to employee benefit plans and that the Bank will fully inform each plan administrator of the role SMC will perform for the Bank in the management of the common fund. The Bank will not delegate any fiduciary responsibility to SMC and will retain full responsibility for the investments of the common fund with authority to accept or reject advice from SMC, even as to specific transactions.

The Bank will charge each plan for its services as trustee an annual fee of 2 percent of the value of the assets of each plan invested in the common fund. SMC will charge the Bank for its services an annual fee of 1.6 percent of the value of the assets in the common fund. Fees paid by the Bank to SMC will be treated as a cost of doing business and will not create additional fees for the plans. However, the Bank may charge directly to the common fund certain expenses incurred for services (such as audits) performed by various service providers, which will be in addition to the regular 2 percent annual fee paid to the Bank. These additional charges will be direct compensation to the service provider with no part inuring to the benefit of the Bank or SMC.

Section 406(a)(1)(C) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he knows or should know that the transaction constitutes a direct or indirect furnishing of goods, services or facilities between the plan and a party in interest with respect to the plan.

Section 3(14) of ERISA defines the term party in interest to include a fiduciary and a person providing services to a plan. Section 3(21)(A)(ii) of ERISA provides that persons are fiduciaries with respect to plans to the extent they render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or have any authority or responsibility to do so. (See 29 CFR 2510.3-21)

Section 408(b)(2) of ERISA, however, provides an exemption from the prohibitions of section 406(a) of ERISA for transactions involving the provision by a party in interest, including a fiduciary, of services necessary for the establishment or operation of a plan if the contract or arrangement is reasonable and no more than reasonable compensation is paid therefor. (See 29 CFR 2550.408b-2 of the regulations.)

To the extent that SMC's services are necessary for the operation of the common fund and the arrangement meets the other requirements of 29 CFR 2550.408b-2 (which are inherently factual questions on which the Department will not offer opinions), SMC would be permitted to perform the advisory and record keeping services under section 408(b)(2) of ERISA. (See ERISA Procedure 76-1, section 5.01.)

Section 406(b)(1) of ERISA prohibits fiduciaries from dealing with assets of plans in their own interest or for their own account. Although regulations under section 406 of ERISA have not been issued, the regulations under section 408(b)(2) of ERISA (29 CFR 2550.408b-2(e)) provide that fiduciaries are self-dealing when, for example, they use the authority, control, or responsibility which makes them fiduciaries to cause plans to pay additional fees to them (or to a person in which they have an interest which may affect the exercise of their best judgments as fiduciaries) to provide services. To cause plans to pay additional fees are separate transactions which are not exempt under section 408(b)(2) of ERISA.

It does not appear that, in appointing SMC to provide investment advice under the representations contained in your submissions, the Bank would be exercising the authority, control or responsibility which makes it a fiduciary to cause the plan to pay an additional fee. Accordingly, it is the Department's opinion that the mere appointment of SMC would not, in

itself, constitute a violation of section 406(b)(1) by the Bank. However, because a violation of the self-dealing proscription contained in section 406(b)(1) could occur in the course of the Bank's deliberations regarding the retention of SMC, the Department is unable to rule that the decision to retain SMC would never violate that section.

Under Reorganization Plan No.4 of 1978 (Executive Order 12108, 44 FR 1065) the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, which certain exceptions not here relevant, to the Secretary of Labor, and the Secretary of the Treasury shall be bound by the rulings issued by the Secretary of Labor pursuant to the authority. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

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

Sincerely,

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