U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

October 20, 1992

Mr. John B. Brescher, Jr., Esq.
McCarter & English
Four Gateway Center
100 Mulberry Street
P. O. Box 652
Newark, NJ 07101-0652

92-23A

Dear Mr. Brescher:

This is in response to your request for an advisory opinion regarding the application of the prohibited transaction provisions of section 406 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code (the Code). Your letter concerns purchases of securities issued by the parent company of Citizens First National Bank of New Jersey (the Bank) at the direction of fiduciaries of employee benefit plans for which the Bank serves as trustee.

According to your representations, the Bank is a wholly owned subsidiary of Citizens First Bancorp., Inc. (Bancorp), a bank holding company organized and existing under the laws of the State of New Jersey. Bancorp is a publicly held company; its stock is regularly traded on the American Stock Exchange.

You represent that the Bank, as part of its regular banking services, maintains a Prototype Defined Contribution Plan and Trustee/Custodial Account (the Prototype Plan) for adoption by those of its customers who wish to adopt a qualified retirement program. You state that the Bank may be appointed to serve either as custodian or trustee of an employee benefit plan that adopts the Prototype Plan. You indicate that, in either of these cases, the Bank must invest funds held thereunder in accordance with the requirements of ERISA.

You state that, where the Bank serves as trustee, the Prototype Plan permits investments "in any form of property," expressly including "securities issued by the Trustee and/or affiliates of the Trustee." An adopting employer has the option to direct investments by the trustee, to appoint an investment manager (registered as an investment advisor under the Investment Advisors Act of 1940) to direct investments by the trustee, or to give the trustee sole investment management responsibility. The employer must choose an option in its adoption agreement and the Bank must agree to it. You represent that if the Bank as trustee is subject to the investment direction of the employer or of an investment manager, any investment direction to the Bank must be made in writing by the authorized person.

According to your representations, the Bank, as directed trustee, anticipates receiving directions to purchase Bancorp stock on behalf of a plan. Such stock purchases would be made on the open market on the American Stock Exchange through an unaffiliated national brokerage firm selected by the Bank. No more than fair market value would be paid for the stock and the Bank would receive no commission as a result of any such purchase. The identity of the sellers of any stock so purchased would not be known to the Bank and would, you state, be difficult, if not impossible, to ascertain. You represent that the Bank does not act as market-maker for such stock.

You request an opinion as to whether the Bank would engage in a prohibited transaction within the meaning of section 406 of ERISA or section 4975 of the Code if, in its capacity as directed trustee of an employee benefit plan which adopts the Prototype Plan, it purchased Bancorp stock on the American Stock Exchange on behalf of any such

plan, at the proper direction of a named fiduciary having the authority to direct investments by the Bank, or of an investment manager appointed by a named fiduciary.[1]

Section 403(a) of ERISA provides, in part, that a plan trustee 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 trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustee shall be subject to the proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to ERISA; or (2) the authority to manage, acquire, or dispose of the assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3) of ERISA.

Section 406(a)(1)(A) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he or she knows or should know that the transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest. Section 3(14) of ERISA defines the term "party in interest" to include a fiduciary with respect to a plan and a person providing services to a plan, as well as a 10 percent or more shareholder, directly or indirectly, of such a person.[2]

Section 406(b)(1) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his or her own interest or for his or her own account.

With respect to purchases and sales of Bancorp stock on the open market in the manner described above, we note that the Conference Report accompanying ERISA states that:

> In general, it is expected that a transaction will not be a prohibited transaction (under either the labor or tax provisions) if the transaction is an ordinary "blind" transaction purchase or sale of securities through an exchange where neither buyer or seller (nor the agent of either) knows the identity of the other party involved. In this case, there is no reason to impose a sanction on a fiduciary (or party-in-interest) merely because, by chance, the other party turns out to be a party-in-interest (or plan). H.R. Rep. 93-1280, 93rd Cong., 2d Sess., 307 (1974).

Based on your representations, it is the opinion of the Department that purchases and sales of Bancorp stock in blind transactions executed by unaffiliated brokers at the proper direction of named fiduciaries of plans of its customers would not constitute transactions described in section 406(a)(1)(A) of ERISA. Moreover, under such circumstances, the Bank would not exercise the authority, control or responsibility to cause the plans for which it serves as directed trustee to engage in purchases and sales of Bancorp stock. Accordingly, it is the Department's view that the Bank, as directed trustee, would not engage in prohibited self-dealing under section 406(b)(1) solely as a result of following

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

[2] We note that while Bancorp is thus a party in interest for purposes of Title I of ERISA, it is not a "disqualified person" under the parallel provisions of the Code. In this regard, contrast section 3(14)(H) of ERISA with section 4975(e)(2)(H) of the Code.

the directions of an unaffiliated named fiduciary, made in accordance with section 403(a), to purchase Bancorp stock.[3]

It should be pointed out, however, that under section 403(a)(1) of ERISA, a trustee that is subject to proper directions from the plan's named fiduciary remains responsible for determining whether following a given direction would result in a violation of ERISA. The directed trustee also has responsibility to exercise discretion where the directed trustee has reason to believe that the named fiduciary's directions are not made in accordance with the terms of the plan or are contrary to ERISA. Furthermore, as with other fiduciary duties, the trustee must ascertain whether existing or potential conflicts of interest may interfere with the proper exercise of this responsibility. Whether, in light of all the facts and circumstances, a trustee is subject to a conflict of interest or has reason to believe that a particular direction is contrary to ERISA are inherently factual questions as to which the Department generally will not opine. See section 5.01 of ERISA Procedure 76-1, 41 Fed. Reg. 36281 (Aug. 27, 1976).

If the named fiduciary has designated an investment manager pursuant to ERISA section 402(c)(3), then pursuant to ERISA section 405(d)(1) the trustee is not liable for the acts and omissions of the investment manager and is under no obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager. Under ERISA section 405(d)(2), however, the trustee would remain liable for any acts of the trustee including knowing participation or knowing concealment of a breach by another fiduciary under ERISA section 405(a)(1).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure describes the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

[3] We assume, for purposes of this ruling, that the Bank does not have any additional authority to vote or otherwise deal with Bancorp stock held by plans for which it serves as directed trustee.