

U.S. Department of Labor

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



APR 27 1993

Robert L. Abramowitz, Esq.
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103-6993

93-12A
PTE 77-4

Re: PNC Financial Corp
Identification Number C-9110

Dear Mr. Abramowitz:

This is in response to your request, on behalf of PNC Financial Corp and its affiliates, for an advisory opinion regarding the application of Prohibited Transaction Exemption 77-4 (42 FR 18732, April 8, 1977) (PTE 77-4).

You represent that PNC Financial Corp is a bank holding company comprised of a number of affiliates including "national banks" regulated by the Office of the Comptroller of the Currency, and "state-chartered banks" regulated by the state banking authorities. PNC Financial Corp is also affiliated with non-bank entities.

One or more of the affiliates of PNC Financial Corp (hereinafter referred to individually as PNC Affiliated Companies and collectively as PNC) serves as trustee with investment discretion, or as investment manager, over the assets of a number of employee benefit pension plans (the Plans) within the meaning of section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). PNC Affiliated Companies also serve as investment advisers for several mutual funds (the Funds), each of which is registered as an open-end, investment company under the Investment Company Act of 1940. In addition, PNC Affiliated Companies may provide one or more additional services (Secondary Services) to some of the Funds (the PNC Serviced Funds).

PNC charges the PNC Serviced Funds a fee for its services as investment adviser and separate fees for any Secondary Services performed. As fiduciary for the Plans, PNC has the authority to invest plan assets in any of the Funds, including PNC Serviced Funds. In the event PNC invests plan assets in a Fund, PNC credits the Plan's pro rata share of the investment advisory fee paid to PNC by the Fund against the investment management fee paid to PNC by the Plan. Alternatively, the investment management fee paid by the Plan to PNC is waived with respect to plan assets invested in the Funds. In either case, PNC proposes to collect all fees for Secondary Services provided to PNC Serviced Funds without waiver of, or credit for, a Plan's pro rata share of such fees paid by a PNC Serviced Fund. PNC represents that it will meet the terms and conditions of PTE 77-4.

Secondary Services include acting as transfer agent or providing custodial, and administrative and accounting services. Fee arrangements with Secondary Service providers vary from Fund to Fund. In some instances, a flat fee is assessed for a combination of Secondary Services. In other instances, the fees may be based on a percentage of fund assets, or as a function of the number of accounts, or the volume of transactions. The fees charged with respect to Secondary Services are separately ascertainable from investment advisory fees.

In effect, you request an advisory opinion regarding the application of PTE 77-4 to the proposed purchase and sale of shares of the PNC Serviced Funds by Plans for which PNC serves as fiduciary, without the waiver or credit of fees for Secondary Services paid to PNC Group by the PNC Group Serviced Funds.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) the authority to issue rulings under section 4975 of the Code has been transferred, with certain exceptions, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to corresponding sections of the Code.

PTE 77-4 provides, in part, that:

The restrictions of section 406 of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to the purchase and sale by an employee benefit plan of shares of an open-end investment company registered under the Investment Company Act of 1940, the investment adviser for which is also a fiduciary with respect to a plan (or an affiliate of such fiduciary) and is not an employer of employees covered by the plan (hereinafter referred to as "fiduciary/investment adviser"), provided that the following conditions are met . . .

Paragraph (c) of section II of PTE 77-4 states that "[t]he plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment."

However, paragraph (c) of section II further provides that:

This condition does not preclude the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940. This condition also does not preclude payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of investment advisory fees paid by the investment company.

The preamble to the proposed class exemption states that

[t]he proposed exemption would not permit the payment of a "double" investment advisory or investment management fee by the plan with respect to those assets invested in the mutual fund shares (i.e., both the direct fee paid by the plan to its fiduciary with respect to the invested assets, and the investment advisory fee paid with respect to such assets by the mutual fund to such fiduciary as investment adviser for the mutual fund).¹

The preamble further explains that

[t]hese safeguards require that appropriate disclosure be made to a second plan fiduciary . . . with particular emphasis on the nature of the investment advisory and other fees paid by the mutual fund to its investment adviser and how such fees differ from the fee paid directly by the plan to its fiduciary.²

In the Department's view, PTE 77-4 does not specifically condition exemptive relief on the crediting of fees to Plans for services paid by the investment company other than investment advisory services. It is the Department's further view that whether a particular service constitutes the provision of investment advisory services or is in fact an additional service depends on the facts and circumstances of each case. Accordingly, PTE 77-4 would be available

¹ 41 FR 50516, November 16, 1976

² Id at 50517.

for the purchase and sale of shares of the PNC Serviced Funds by the Plans for which PNC serves as fiduciary,³ if the Secondary Services are not in fact investment advisory services and the conditions of PTE 77-4 are otherwise met, including the requirement that the Secondary Service fees are disclosed to the independent fiduciary.⁴

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10, relating to the effect of advisory opinions. We note that pursuant to section 5 of ERISA Procedure 76-1 this advisory opinion relates solely to the arrangement described above involving PNC.

Sincerely,

Ivan L. Strasfeld
Director
Office of Exemption Determinations

³ The fact that a transaction is the subject of an administrative exemption does not relieve a fiduciary from the general fiduciary responsibility provisions of section 404 of ERISA. In this regard, the Department emphasizes that it expects the plan fiduciary with investment management responsibility to consider the totality of fees to be paid by the plan directly, and/or indirectly through the mutual fund, prior to entering into the arrangement.

⁴ In this regard, the Department notes that at the time PTE 77-4 was granted, the use of a portion of the assets of a registered investment company to pay distribution expenses was not generally permitted by the Securities and Exchange Commission. Accordingly, the payment of fees pursuant to a distribution plan adopted in accordance with Rule 12b-1 under the Investment Company Act ("12b-1 fees"), was not specifically considered by the Department as part of its determination to grant PTE 77-4. In any event, the Department does not believe that the payment of a 12b-1 fee by a fund to a plan fiduciary or its affiliate can be functionally distinguished in many instances from the payment of a commission by the plan in connection with the acquisition or sale of shares in a mutual fund. Therefore, the Department is unable to conclude that PTE 77-4 would be available for plan purchases and sales of mutual fund shares if a 12b-1 fee is paid to the fiduciary or its affiliate with regard to that portion of the Fund's assets attributable to the plan's investment.