U.S. Department of Labor

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

APR 27 1993

93-13A
PTE 77-4

Fred R. Green, Esq.
Schulte Roth & Zabel
900 Third Avenue
New York, NY 10022

Re: Frank Russell Company
Identification No.: C-9103

Dear Mr. Green:

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

You represent that Frank Russell Company (FRC), Frank Russell Trust Company (FRTC), Frank Russell Investment Company (FRIC) and Frank Russell Investment Management Company (FRIMCO) are part of a group of affiliated companies referred to as the Frank Russell Group (hereinafter referred to collectively as FRG).

You further indicate that FRTC serves as trustee, or as investment manager with respect to employee benefit plans (Plans). In addition, FRIMCO serves as investment adviser[1] for a family of mutual funds (the Funds) sponsored by FRIC, each of which is an open-end, registered investment company under the Investment Company Act of 1940. FRIMCO develops the investment programs for each of the Funds, selects money managers/investment advisers (Sub-Advisers) within each of the Funds, allocates assets among the Sub-Advisers within each Fund and monitors the Sub-Advisers' investment programs and results.

FRTC proposes to invest plan assets in the Funds. The Plans will continue to pay an investment advisory fee to FRTC with respect to all plan assets for which FRTC is a trustee with investment discretion or investment manager, including plan assets invested in the Funds. The Plans and the Funds will not pay an investment advisory or similar fee to FRIMCO, or any affiliate, with respect to the plan assets invested in the shares of the Funds. However, shareholders of the Funds, other than the Plans, will pay an investment management fee directly to FRIMCO. In turn, FRIMCO is responsible for the payment of investment advisory fees to the Sub-Advisers of the Funds from fees it receives.

In addition, FRC and FRIMCO provide other services (Secondary Services) to the Funds including (i) transfer agent services; (ii) portfolio activity reports; (iii) analysis of international management reports; and (iv) tax record maintenance. FRIMCO and FRC propose to collect all fees for Secondary Services provided to the Funds without waiver of, or credit for, the Plans' pro rata share of such fees.

You state that a fiduciary of a Plan who is independent of and unrelated to FRTC or any affiliate will receive a current prospectus provided by FRTC and written disclosure of the investment advisory and other fees, and any

[1] The applicant represents that FRIMCO is an investment adviser registered under section 203 of the Investment Advisers Act of 1940. Further, the applicant represents that FRIMCO is an investment adviser with respect to the Funds as defined in section 2(a)(20) of the Investment Company Act of 1940.

change in such fees, to be paid to FRG by the Funds.[2] After reviewing the written fee disclosures and the prospectus, the independent fiduciary will provide written approval of a program of investment of Plan assets in the shares of the Funds. The form of the written approval may include, but is not limited to, the execution of modified trust and investment management agreements by the independent fiduciary and FRTC.

You ask whether FRIMCO's waiver of the investment advisory fee, otherwise payable by the Plans to FRG in connection with the investment of plan assets in the Funds, complies with the requirements of paragraph (c) of section II of PTE 77-4.[3] Further, you ask whether paragraphs (d), (e) and (f) of section II of PTE 77-4 require written disclosure and approval of fees paid to parties unrelated to FRIMCO, or any affiliate, with respect to the investment of plan assets in the Funds. Finally, you ask whether PTE 77-4 provides relief for the purchase or sale of shares of the Funds subsequent to the approval by a Plan fiduciary, independent of and unrelated to FRTC, of a program for the purchase or sale of shares in the Funds, without prior approval of each such purchase or sale by the independent Plan fiduciary.

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 or 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 advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. 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 (41 FR 50516, November 16, 1976) explains that:

> the 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 by the mutual fund to such fiduciary as investment advisor for the fund).

In addition, paragraph (d) of section II of PTE 77-4 provides that:

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[2] We assume, for purposes of this letter, that the fee disclosure includes disclosure of the investment management fees paid directly to FRIMCO by shareholders other than the Plans.

[3] Although you have not requested an opinion regarding the retention of fees for Secondary Services, it is the Department's 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, the Department is expressing no opinion regarding your characterization of the services for which you propose to collect fees as services other than investment advisory services.

> A second fiduciary with respect to the plan, who is independent of and unrelated to the fiduciary/investment adviser or any affiliate thereof, receives a current prospectus issued by the investment company, and full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including the nature and extent of any differential between the rates of such fees, the reasons why the fiduciary/investment adviser may consider such purchases to be appropriate for the plan, and whether there are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations.

Further, paragraph (e) of section II of PTE 77-4 states that:

> On the basis of the prospectus and disclosure referred to in paragraph (d), the second fiduciary approves such purchases consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. Such approval may be limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by the plan and need not relate to any other aspects of such investment. In addition, such approval must be either (1) set forth in the plan documents or in the investment management agreement between the plan and the fiduciary/investment adviser, (2) indicated in writing prior to each purchase or sale, or (3) indicated in writing prior to the commencement of a specified purchase or sale program in the shares of such investment company.

In addition, paragraph (f) of section II of PTE 77-4 provides that:

> The second fiduciary referred to in paragraph (d), or any successor thereto is notified of any change in the rates of the fees referred to in paragraph (d) and approves in writing the continuation of such purchases or sales and the continued holding of any investment company shares acquired by the plan prior to such change and still held by the plan. Such approval may be limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by the plan and need not relate to any other aspects of such investment.

It is the opinion of the Department that the arrangement described in your submissions for the payment of investment management fees by the Plans to FRTC and the waiver of investment advisory fees otherwise payable by the Plans to FRIMCO, or any affiliate, with respect to plan assets invested in the Funds will satisfy the conditions of paragraph (c) of section II of PTE 77-4.[4] With respect to your second request, the Department is of the view that the

[4] The Department notes that PTE 77-4 would not be available for the purchase or sale of investment company shares if any of the secondary services for which FRIMCO and/or FRC receive compensation involved any function which would be considered to constitute the provision of investment advisory services.

The Department further 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

conditions of paragraphs (d), (e) and (f) of section II of PTE 77-4 do not apply to fees paid to parties unrelated to FRIMCO, or any affiliate, under the above-described arrangement.[5] With respect to your last issue, the Department believes that PTE 77-4 provides relief for transactions in which FRTC causes a Plan to purchase or sell shares of the Funds subsequent to written approval by a Plan fiduciary, independent of and unrelated to FRTC, of a program for the purchase or sale of shares in the Funds, without the prior approval of each such purchase or sale by an independent fiduciary, provided all of the other conditions of the exemption are met.

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 involving FRG.

Sincerely,

Ivan L. Strasfeld
Director
Office of Exemption Determinations

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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.

[5] 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.

Also, the Department is expressing no opinion herein on whether disclosure is required under PTE 77-4 where the fees paid to the sub-advisers are paid out of the investment advisory fees paid to the investment adviser with respect to plan assets invested in the fund.