U.S. Department of Labor

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

August 7, 1996

96-15A
ERISA SEC. 408(b)(8)

Mr. John J. Cleary
Goodwin, Procter & Hoar
Exchange Place
Boston, Massachusetts 02109-2881

Dear Mr. Cleary:

This is in response to your request for an advisory opinion on behalf of Scudder Trust Company (the Trust Company) concerning the application of section 408(b)(8) of the Employee Retirement Income Security Act of 1974 as amended (ERISA), section 4975(d)(8) of the Internal Revenue Code (the Code), and Prohibited Transaction Exemption (PTE) 91-38 to transactions involving collective investment vehicles established by the Trust Company under certain circumstances described in your request.

You represent that the Trust Company is a wholly-owned subsidiary of Scudder, Stevens & Clark, Inc. (the Adviser), a registered investment adviser under the Investment Advisers Act of 1940. The Trust Company is subject to the supervision and examination of the New Hampshire Bank Commissioner. The Trust Company serves as a discretionary trustee and the Adviser supervises or manages the assets of various employee benefit plans subject to Title I of ERISA.

By Declarations of Trust (the Trust Declarations), the Trust Company has established several New Hampshire investment trusts (the Funds) pursuant to the New Hampshire Investment Trust Act. N.H. Rev. Stat. Ann. §293-B:1 et seq. The Funds are designed to permit the efficient management of the assets of institutional investors (including, but not limited to, ERISA-covered plans) by commingling the assets of eligible investors with substantially similar investment objectives into pooled investment trusts. Each Fund seeks to achieve its particular investment objective through investment in a diversified portfolio of securities. It is anticipated that ERISA-covered plans (the Plans), including Plans for which the Adviser is currently a fiduciary, will acquire beneficial ownership interests in each of the Funds.

Pursuant to the Trust Declarations, the Trust Company, as trustee of the Funds, has exclusive authority and control over all aspects of the management and operation of the Funds. Each Declaration authorizes the Trust Company generally to do all acts that it deems necessary or incidental to carry out the investment and business activities of each Fund, including the following powers and responsibilities: (1) manage the investments of each Fund; (2) appoint agents and independent contractors to carry out the business of each Fund; (3) establish eligibility rules regarding admission of investors; (4) accept or reject subscriptions to a Fund by prospective investors; (5) control the offering of interests in each Fund; (6) maintain the record books for each Fund; (7) expand the rights of beneficial owners in each Fund to redeem their shares; (8) delay distribution to any beneficial owner upon redemption of shares of a Fund; (9) valuate the assets of each Fund; (10) amend the terms of a Declaration; (11) perform all recordkeeping of each Fund and furnish financial statements; and (12) terminate a Fund at any time upon 60 days' written notice to the beneficial owners.

You represent that the Trust Company is given the authority under the Trust Declarations to appoint persons to manage the Funds who may be affiliates of the Trust Company. The Trust Company intends to retain the Adviser as manager of the Funds. As Fund manager, the Adviser may be authorized by the Trust Company to exercise

investment discretion with respect to the investments of the Fund, subject to the investment objective guidelines and restrictions specified in the Declaration establishing the Fund and such additional restrictions as may be specified by the Trust Company in its management agreement with the Adviser. The Trust Company has the authority to terminate the Adviser at any time for cause or, if the termination is without cause, upon short notice.[1] The Trust Company will monitor the performance of the Adviser on an on-going basis and will at all times remain responsible for the management and operation of each Fund.

You further represent that, under the Trust Company's arrangements with the Plans, all fees paid to the Trust Company will be paid by the Plans rather than from the Funds. Before a Plan invests in a Fund, the Adviser's role as manager of the Funds will be disclosed, and an independent fiduciary acting on behalf of the Plan must both authorize the transfer of plan assets to the Trust and approve the terms of the fees to be paid. The Adviser's fees for managing the Funds will be paid by the Trust Company pursuant to an arrangement negotiated between these parties. You state that in no event will the Trust Company's retention of the Adviser as manager of the Funds increase the fee which is otherwise payable by a Plan with respect to its investment in a Fund.

You request an opinion that the Funds are and would continue to be viewed as pooled investment funds which are "maintained by a bank or trust company" within the meaning of the statutory exemptions in section 408(b)(8) of ERISA and section 4975(d)(8) of the Code and Prohibited Transaction Exemption 91-38 if, under these circumstances, the Trust Company retains its parent company to manage the Funds.[2]

Under Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of labor and the Secretary of the Treasury is bound by interpretations of the Secretary of Labor pursuant to such authority. Therefore, references in this letter to specific sections of ERISA should be read to refer also to the corresponding sections of the Code.

Section 406(a)(1) of ERISA provides, in part, that a fiduciary with respect to a plan shall not cause the plan to engage in certain direct or indirect transactions with a party in interest, including sales or exchanges of property between the plan and a party in interest (406(a)(1)(A)), and transfers to or use by or for the benefit of a party in interest of any assets of the plan (406(a)(1)(D)). 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. Section 406(b)(2) of ERISA provides that a fiduciary shall not in his or her individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

Under Section 3(21) of ERISA, a "fiduciary" with respect to a plan includes a person who exercises any discretionary authority or control respecting management or disposition of its assets; or renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so. Section 3(14) of ERISA defines the term "party in interest" to include a fiduciary and a person providing services to a plan.

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[1] This assumes that in operation that the Trust Company has actual authority to terminate the Adviser as investment manager. You represent that the board of directors of the Trust Company currently includes three out of five directors independent of the Adviser.

[2] The Department notes that any interpretations set forth in this opinion address only the statutory provisions of Title I of ERISA and have no bearing on any applicable securities or banking law requirements.

The Department has issued a plan asset - plan investment regulation defining what constitutes "plan assets" when a plan invests in another entity. The regulation provides, at 29 C.F.R. 2510.3-101(h)(1)(ii), that when a plan acquires an interest in a common or collective trust fund of a bank, its assets include its investment as well as an undivided interest in each of the fund's underlying assets.

As you have acknowledged, the Trust Company is a fiduciary under section 3(21) of ERISA with respect to ERISA-covered plans for which it serves as Trustee. Pursuant to the plan asset - plan investment regulation, the Trust Company is also a fiduciary with respect to ERISA-covered plans that invest in the Funds by reason of its discretionary authority and control over the assets of the Funds. You further indicate that the Trust Company receives a separate management fee from plans that invest in the Funds. Therefore, unless an exemption applies, the Trust Company would violate sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1) and 406(b)(2) if, as a fiduciary of ERISA-covered plans, it caused plan assets to be invested in the Funds.

Section 408(b)(8) provides a statutory exemption from the provisions of section 406 for the purchase or sale by a plan of an interest in a collective fund maintained by a state or federally regulated bank or trust company that is a party in interest to the plan, provided that the bank or trust company receives no more than reasonable compensation, and the transaction is expressly permitted by the plan or by an independent fiduciary with authority to manage and control the assets of the plan.[3]

PTE 91-38, 56 Fed. Reg. 31966 (July 12, 1991), (which amended and redesignated PTE 80-51) permits bank collective investment funds in which employee benefit plans have an interest to engage in certain prohibited transactions with parties in interest to the plans, if the party in interest is not the bank or any affiliate, or any other Fund maintained by the Bank, provided specified conditions are met. The term "collective investment fund" is defined in the class exemption as a "common or collective trust fund or pooled investment fund maintained by a bank or trust company."

Although the terms "bank or trust company" in ERISA section 408(b)(8) and the term "bank" in PTE 91-38 and the plan asset regulation are not therein defined, it appears from your representations that the Trust Company is regulated by the same state authority and in the same manner as state chartered banks. To the extent that the Trust Company is so regulated, it is the opinion of the Department that the Trust Company is a bank or trust company for purposes of ERISA section 408(b)(8), and a bank for purposes of PTE 91-38, and 29 C.F.R. 2510.3-101(h)(ii).

Further, you have represented that the Trust Company will at all times remain responsible for the management and operation of each Fund and will retain liability under ERISA with respect to Plans investing in the Funds for the consequences of the Adviser's investment decisions. Under these circumstances, it is the opinion of the Department that the Funds would not cease to be "maintained by a bank or trust company" within the meaning of section 408(b)(8) of ERISA and PTE 91-38 merely because the Trust Company appoints the Adviser to exercise investment discretion with respect to the investment of the Funds.[4]

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[3] It is the Department's view that when a person is deemed to be a fiduciary by virtue of rendering investment advice, the presence of an unrelated second fiduciary acting on the investment adviser's recommendations on behalf of the plan would not satisfy the independent fiduciary requirement of section 408(b)(8). Also, under section 404(a)(1)(D) of ERISA, plan documents may be followed only to the extent they are consistent with ERISA. However, if all conditions of the exemption are met, section 408(b)(8) will provide relief from sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1) and 406(b)(2) for the purchase or sale by a bank or trust company, as fiduciary of ERISA-covered plans, of interests in its funds.

[4] You have not requested an opinion, and the Department expresses no view, on whether particular transactions of the Trust Company are covered by these exemptions. Moreover, as a general matter, whether the requirements of the exemptions are met in each case involves questions which are inherently factual in nature. See footnote 3, above.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is subject to the provisions of the Procedure including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

BETTE J. BRIGGS
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

The Department also expresses no view on the application of ERISA's general standards of fiduciary conduct as enumerated under section 404 to the proposed arrangement, nor is this opinion intended to address any issues relating to the fiduciary responsibility of the Adviser.