

PLR 8003155

October 30, 1979

Company P = ***

EIN ***

Dear ***

This is in reply to a request for a ruling submitted by you on behalf of Company P, concerning whether funds held by Company P in a fiduciary capacity as custodian of a tax-sheltered annuity custodial account may be invested in their own common trust funds.

You have submitted the following relevant facts. Company P is a state chartered banking corporation which has limited its activities to exercising fiduciary powers. Company P is a wholly owned subsidiary of a national bank and is thus subject to regulations of the Comptroller of the Currency. Company P has established and maintains common trust funds for taxable and non-taxable trusts pursuant to the Comptroller's regulations.

The following ruling is requested:

May funds held by Company P in their fiduciary capacity as custodian of tax-sheltered annuity custodial accounts be invested in their own common trust funds.

Section 403(b)(7) of the Internal Revenue Code of 1954 provides, in part, that contributions by an employer described in section 403(b)(1)(A) of the Code to a custodial account which satisfies the requirements of section 401(f)(2) will be treated as amounts contributed by an employer for an annuity contract for his employees if, among other requirements, the amounts are to be invested in regulated investment company stock to be held in that custodial account.

Section 403(b)(7)(c) of the Code provides that for purposes of section 403(b)(7), the term "regulated investment company" means a domestic corporation which is a regulated investment company within the meaning of section 851(a).

Section 851(a) of the Code defines "regulated investment company" as any domestic corporation (other than a personal holding company as defined in section 542) --

(1) which at all times during the taxable year, is registered under the Investment Company Act of 1940, as amended (15 U.S.C. 80a-1 to 80 b -- 2) (the "Act") either as a management company or as a unit investment trust, or

(2) which is a common trust fund or similar fund excluded by section 3(c)(3) of such Act (15 U.S.C. 80a-3(c)) from the definition of "investment company" and is not included in the definition of "common trust fund" by section 584(a).

Section 80a-3(c)(3) of the Act provides that none of the following persons is an investment company --

Any bank or insurance company; any savings and loan association, building and loan association, cooperative banks, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent or person thereof or therefor; any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as trustee, executor, administrator, or guardian; or any common trust fund or similar fund, established before June 22, 1936, by a corporation which is supervised or examined by State or Federal authority having supervision over banks, if a majority of the units of beneficial interest in such fund, other than units owned by charitable or educational institutions, are held under instruments providing for payment of income to one or more persons and of principal to another or others. (Emphasis added).

Section 584(a) of the Code defines the term "common trust fund" as a fund maintained by a bank --

(1) exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity --

(A) as a trustee, executor, administrator or guardian, or

(B) as a custodian of accounts

(i) which the Secretary determines are established pursuant to a State law which is substantially similar to the Uniform Gift to Minors Act published by the American Law Institute, and

(ii) with respect to which the bank establishes, to the satisfaction of the Secretary, that it has duties and responsibilities of a trustee or guardian; and

(2) in conformity with the rules and regulations, prevailing from time to time, of the Board of Governors of the Federal Reserve System or the Comptroller of the Currency pertaining to the collective investment of trust funds by national banks.

While the definition of the term "common trust fund" contained in section 584(a) of the Code is very similar to the definition in 80 -- 3(c)(3) of the Act, it differs in that section 584(a) of the Code requires that the common trust fund be maintained in accordance with rules and regulations of the Board of Governors of the Federal Reserve System or the Comptroller of the Currency applicable to the collective investment of trust funds by national banks. Section 80-3(c)(3) of the Act contains no similar provision.

Consequently, it would only be possible for a common trust to qualify as a regulated investment company if it was a domestic corporation and satisfied the definition contained in section 80-3(c)(3) of the Act but did not satisfy section 584(a) of the Code because it was not required to be maintained in accordance with rules and regulations of the Board of Governors of the Federal Reserve System or the Comptroller of the Currency applicable to the collective investment of trust funds by national banks.

Thus, if Company P's common trust funds qualify as common trust funds within the meaning of section 584(a) of the Code, they will not satisfy the definition of "regulated investment company" contained in section 851(a). Furthermore, the common trusts will also fail to satisfy the requirements of section 851(a) because they are not domestic corporations.

On the basis of the foregoing, we conclude that funds held by Company P in their fiduciary capacity as custodian of tax-sheltered annuity custodial accounts may not be invested in their own common trust funds.

Sincerely yours,

A. D. Fields

Chief, Employee Plans Technical Branch