



May 11, 2005

2005-10A
CODE SEC.
4975(c)(1)(E) & (F)

Sandra Parks Faulkner
Baker and Hostetler LLP
65 East State Street
Columbus, OH 43215

Kristin H. Ives
Stradley Ronon Stevens & Young LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098

Dear Ms. Faulkner and Ms. Ives:

This is in response to your application, on behalf of COUNTRY Trust Bank (Bank), for an exemption from the prohibited transaction provisions of section 4975 of the Internal Revenue Code (the Code) with respect to a combination of services the Bank provides to certain individual retirement accounts (IRAs) under the CoMPAS Program.

On the basis of the facts and representations contained in your submission, it is the view of the Department that, for the reasons discussed below, the transactions with respect to which you have requested exemptive relief would not, to the extent executed in a manner consistent with such facts and representations, violate section 4975(c)(1)(E) and (F) of the Code. Accordingly, we have determined that the appropriate response to your request is an advisory opinion, rather than an exemption under section 4975(c)(2) of the Code.¹

You represent that the Bank is a federally chartered thrift registered as an investment adviser with the U.S. Securities and Exchange Commission (SEC) under the Investment Advisers Act of 1940 (Advisers Act). The Country Managed Portfolio Account Service (i.e., CoMPAS) Program involves the Bank's investment of assets of IRAs participating in the CoMPAS Program in accordance with certain model investment strategies (Investment Strategies). The CoMPAS Program is made available to all types of IRAs, including traditional IRAs, prototype IRAs, Roth IRAs, Simplified Employee Pension IRAs (SEP-IRAs) and SIMPLEs (collectively referred to herein as "IRAs"). IRAs

¹Under Presidential Reorganization Plan No. 4 of 1978, effective December 31, 1978 [5 USC App. at 214 (2000 ed.)], 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 the interpretations of the Secretary of Labor pursuant to such authority.

maintained by employees of the Bank or any of its affiliates are also eligible to participate in the CoMPAS Program.² The CoMPAS Program will also be offered in the future to plans qualified under section 401(a) of the Code, such as plans described under Code section 401(k).³

Under the CoMPAS Program, the Bank serves as trustee or custodian of the IRAs. The Bank's duties with respect to the IRAs typically include accounting, record-keeping, administrative, tax reporting, and shareholder services. The Bank provides investment advice to IRA Holders by recommending investment of IRA assets in a manner consistent with one of five model Investment Strategies developed by the Bank. The Bank recommends a definitive Investment Strategy after reviewing and analyzing questionnaires completed by the individuals who establish IRAs or by the IRA beneficiaries (collectively referred to herein as "IRA Holders").

You represent that the Bank has sole responsibility to review, evaluate and recommend an appropriate Investment Strategy for an IRA Holder. An IRA Holder maintains the ultimate authority to direct the investment of an IRA. An IRA Holder may direct his or her IRA to be invested pursuant to a recommended Investment Strategy, another Investment Strategy, or may decline to participate in the CoMPAS Program.

If the IRA Holder participates in the CoMPAS Program, the Bank implements the Investment Strategy for the IRA in accordance with the CoMPAS IRA Agreement (Agreement) entered into by each IRA Holder. The Agreement gives the Bank authority to invest in the chosen Investment Strategy, make certain adjustments to the Investment Strategy (Investment Strategy Adjustments), and engage in purchases and sales of Fund shares to rebalance the IRA's portfolio in accordance with the terms of the Agreement.

The Bank serves as the investment adviser and custodian for mutual funds (Affiliated Funds) registered under the Investment Company Act of 1940 (1940 Act), as amended. Currently, there are three Affiliated Funds that are available for investment by the IRAs under the CoMPAS Program, pursuant to certain Investment Strategies recommended by the Bank. The Affiliated Funds are a diversified series of the COUNTRY Mutual Funds Trust (CMFT), an open-end management investment company registered under the 1940 Act and organized as a Delaware business trust. Overall responsibility for management of each Affiliated Fund rests with the CMFT's Board of Trustees (Board of Trustees). The Board of Trustees manages the Affiliated Funds in accordance with the

² The Department assumes for purposes of this opinion that the IRAs covering individuals who are employees of the Bank or an affiliate would not be considered "employee benefit plans" subject to Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), as described in 29 CFR §2510.3-2(d).

³ To the extent that such a plan would be considered an "employee benefit plan" for purposes of Title I of ERISA, the prohibited transaction provisions contained in section 406 of ERISA would be applicable.

laws of the State of Delaware governing business trusts. The Board of Trustees elects CMFT's officers to actively supervise the Affiliated Funds' day-to-day operations.

The Bank, in its capacity as investment adviser and custodian to the Affiliated Funds, bears all expenses incurred in connection with the performance of its duties, other than the cost of securities (including brokerage commissions) purchased for the Affiliated Funds.

Neither the Bank nor any affiliate of the Bank serves as the named distributor for any Affiliated Fund. The Affiliated Funds' principal underwriter and distributor is Quasar Distributors, LLC (Quasar). Quasar is a wholly owned subsidiary of Firststar Bank NA and is not an affiliate of the Bank. Neither Quasar nor any of its affiliates provide any investment advice or make any recommendations to the IRA Holders in connection with the IRAs' participation in the CoMPAS Program. COUNTRY Capital Management Company (CCMC), a broker-dealer affiliated with the Bank, serves as a selected dealer for the Affiliated Funds pursuant to a dealer agreement with Quasar. However, as discussed further below, no portion of any fees paid by an Affiliated Fund to Quasar will be used to compensate CCMC for investments in the Affiliated Funds made by IRAs participating in the CoMPAS Program.⁴

The three Affiliated Funds currently available for investment under the CoMPAS Program, pursuant to certain recommended Investment Strategies, are the COUNTRY Growth Fund, the COUNTRY Short-Term Bond Fund, and the COUNTRY Bond Fund.

Mutual Funds that are unrelated to the Bank (Third Party Funds) are also available for investment under the CoMPAS Program. Third Party Funds are separate diversified series of open-end management investment companies registered under the 1940 Act. No Third Party Fund's sponsor, administrator, distributor, investment adviser or sub-adviser is affiliated with the Bank. The Affiliated Funds and Third Party Funds are collectively referred to herein as "the Funds."

You represent that the Bank and its affiliates are entitled to receive three types of fees: (i) investment advisory fees (the Advisory Fees) from the Affiliated Funds; (ii) non-advisory fees from the Affiliated Funds (Non-Advisory Fees); and (iii) a Management Fee paid by each IRA. With respect to Non-Advisory Fees paid by the Affiliated Funds, the Bank and its affiliates are entitled to receive custodial fees and fees paid pursuant to

⁴ The Department expresses no opinion herein as to whether additional prohibited transaction concerns are raised with respect to the hiring of CCMC by Quasar to provide brokerage services for a Fund.

each Affiliated Fund's Plan of Distribution (12b-1 fees).⁵ For its custodial services, you state that the Bank currently receives no additional compensation from any of the Affiliated Funds. You represent that the Bank has waived receipt of all fees otherwise due under a custodial arrangement it has entered into with CMFT on behalf of the Affiliated Funds. With respect to 12b-1 fees, you represent that neither the Bank nor an affiliate receives or will receive any 12b-1 fees on any assets invested in the Affiliated Funds pursuant to the CoMPAS Program. However, if circumstances change, you represent that all Non-Advisory Fees, including any 12b-1 fees, will be offset against the Management Fee.

You represent that the total fees that are paid to the Bank and its affiliates constitute no more than reasonable compensation for the services provided to the IRA. Any fees received by the Bank from sources other than the IRA, such as the Advisory Fees and Non-Advisory Fees, are applied to offset the IRA's legal obligation to the Bank (such as the Management Fee, discussed below). You state that under no circumstances will any fees received by the Bank or an affiliate from sources other than the IRA increase the total compensation received by the Bank and its affiliates.⁶ All Advisory Fees payable to the Bank and other fees paid to the Bank or its affiliates are disclosed in each Affiliated Fund's prospectus and statement of additional information.

The Advisory Fees that the Bank or an affiliate receives as a result of investment by the IRAs in the Affiliated Funds are calculated and accrued daily and paid monthly based on the Affiliated Fund's average daily net assets. The Bank may, from time to time, waive all or a portion of the Advisory Fee. The Board of Trustees, including a majority of Trustees who are not "interested persons," as that term is defined in the 1940 Act, must approve each fee arrangement between the Bank and an Affiliated Fund.

Each Affiliated Fund pays Quasar a monthly 12b-1 fee, which may be used by Quasar to provide distribution assistance or to compensate financial intermediaries, broker-dealers or similar entities for providing shareholder services.⁷ You represent that Quasar does not retain any portion of the 12b-1 fees. No portion of the 12b-1 fees paid to Quasar are currently used by Quasar to compensate a broker-dealer affiliated with the Bank (e.g., CCMC) for investments in the Affiliated Funds made by the IRAs under

⁵A Plan of Distribution is a plan adopted under Rule 12b-1 of the 1940 Act.

⁶The Department notes that the IRAs should be entitled to any such fees that exceed the IRA's liability to the Bank, in order for the Bank to avoid receiving excess fees through a use of its discretionary authority or control as a fiduciary, thereby raising fiduciary self-dealing concerns. See Advisory Opinion 97-15A (May 22, 1997). However, the Department is expressing no opinion herein as to the propriety of such a pass-through of fees under Federal securities laws. Questions concerning the application of the Federal securities laws are within the jurisdiction of the SEC.

⁷The current maximum 12b-1 fee is 0.25 percent of the average daily net assets of each Affiliated Fund.

the CoMPAS Program. In addition, neither the Bank nor an affiliate currently receive, or will receive, any compensation, including 12b-1 fees, from the Third Party Funds for investments made by the IRAs under the CoMPAS Program.

For the provision of asset allocation, custody and related services, the Bank charges each IRA participating in the CoMPAS Program an annual investment fee (i.e., the Management Fee) equal to 1.75% on the first \$50,000, 1.5% on the next \$250,000, and 1.25% on all assets over \$300,000. The Bank may increase or decrease the Management Fee from time to time. In the case of a Management Fee increase, the Bank will notify each IRA Holder of the impending increase at least thirty (30) days prior to its effective date. The notice will: (1) include a Termination Advisory; (2) remind the IRA Holder of the right to withdraw from the CoMPAS Program or to transfer to another Investment Strategy without penalty; and (3) provide that absent an affirmative action, the new fee will be effective as of a given date no earlier than 30 days after such notice and Termination Advisory is sent. The Management Fee is assessed monthly, in arrears, on the IRA's value as of the last business day of the month. You state that the Management Fee is deducted directly from the IRA's assets.

You represent that fees paid to Quasar or its affiliates are not subtracted from the Management Fee because neither Quasar nor any of Quasar's affiliates provide any investment advice or make any recommendations in connection with an IRA Holder's participation in the CoMPAS Program. In addition, as noted earlier, Quasar and its affiliates are not affiliated with the Bank and its affiliates.

At issue is whether the receipt by the Bank or an affiliate of fees from the Affiliated Funds resulting from services provided by the Bank to the IRAs participating in the CoMPAS Program violates section 4975(c)(1)(E) or (F) of the Code.

Section 4975(e)(1) of the Code, in relevant part, defines the term "plan" to include an individual retirement account described in section 408(a) of the Code.⁸ Section 4975(e)(2)(A) of the Code defines the term "disqualified person" to include a fiduciary. Section 4975(e)(3) of the Code defines the term "fiduciary" to mean any person who (A) exercises any discretionary authority or control with respect to the management of such plan or exercises any authority or control with respect to management or disposition of plan assets; (B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any

⁸Section 408(a) of the Code provides that the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries if the written governing instrument creating the trust meets certain requirements.

authority or responsibility to do so; or (C) has any discretionary authority or discretionary responsibility in the administration of such plan.

The Bank, in its provision of investment advice to an IRA Holder participating in the CoMPAS Program regarding a recommended Investment Strategy, acts as a fiduciary pursuant to Code section 4975(e)(3)(B). The Bank also acts as a fiduciary for the IRAs participating in the CoMPAS Program by making Investment Strategy Adjustments to the IRAs and by implementing transactions for the rebalancing of the IRAs.

Section 4975(c)(1)(C) of the Code prohibits the furnishing of goods, services or facilities between a plan and a disqualified person. Section 4975(c)(1)(D) of the Code prohibits any transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan. Section 4975(c)(1)(E) of the Code prohibits any act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account. Section 4975(c)(1)(F) of the Code prohibits the receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

Section 4975(d)(2) of the Code exempts from the prohibitions of section 4975(c) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefore. In this regard, section 54.4975-6(a) of the Pension Excise Tax Regulations contains a discussion of what constitutes a "necessary service" (section 54.4975-6(a)(2)) under "a reasonable contract or arrangement" (section 54.4975-6(a)(3)) for "reasonable compensation" (section 54.4975-6(a)(4)).

Thus, to the extent that an arrangement for services provided to the IRAs by the Bank under the CoMPAS Program meets the statutory requirements for an exemption under section 4975(d)(2) of the Code (which is an inherently factual question upon which the Department will not opine), the Bank would be able to perform such services and receive fees, provided that all conditions of the exemption are met.

Section 54.4975-6(a)(1) of the Pension Excise Tax Regulations provides that section 4975(d)(2) does not contain an exemption for acts described in section 4975(c)(1)(E) and 4975(c)(1)(F). Section 54.4975-6(a)(1) provides that such acts are separate transactions not described in section 4975(d)(2). As explained in section 54.4975-6(a)(5), a fiduciary may not use the authority, control or responsibility which makes such person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in

which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service. Nor may a fiduciary use the authority, control or responsibility which makes such person a fiduciary to cause a plan to enter into a transaction involving plan assets whereby such fiduciary (or a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) will receive consideration from a third party in connection with such transaction.

Conversely, a fiduciary does not engage in an act described in section 4975(c)(1)(E) if the fiduciary does not use any of the authority, control or responsibility which makes such person a fiduciary to cause a plan to pay additional fees for a service provided by such fiduciary or to pay a fee for a service furnished by a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary.

Therefore, the receipt of Advisory and Non-Advisory Fees by the Bank and its affiliates attributable to assets of IRAs participating in the CoMPAS Program would not violate section 4975(c)(1)(E) or (F) of the Code if the Management Fees received by the Bank are reduced by an amount equal to such fees and the receipt of such fees does not cause the Bank's compensation to exceed the amount of the Management Fees agreed to by the IRA Holder.⁹

However, if the provision of services by the Bank to an IRA under the CoMPAS Program results, in operation, in a divergence of interests between the Bank and the IRA, or an incorrect offset of service-related fees, then violations of section 4975(c)(1)(E) and (F) of the Code could occur. Thus, the Department is unable to rule that the Bank's receipt of fees as a result of services provided to the IRAs participating in the CoMPAS Program would not, in operation, violate section 4975(c)(1)(E) and (F) of the Code.

Finally, with respect to the possible use of the CoMPAS Program by other qualified retirement plans, such as Code section 401(k) plans, that may be considered an "employee benefit plan" covered by Title I of ERISA, the Department notes that the same analysis and conclusions would apply for purposes of the prohibited transaction provisions contained in section 406(a) and (b) of ERISA. In such instances, the general fiduciary responsibility provisions of ERISA would also apply to the arrangement.

⁹ See generally Advisory Opinion 97-15A (May 22, 1997)(for a discussion of fee offsets by a bank, acting as a plan trustee, to avoid fiduciary self-dealing with respect to compensation received from mutual funds).

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 FR 36281 (Aug. 27, 1976). The letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

In view of this letter, the Department believes that no further action is necessary with respect to your exemption application. Accordingly, your exemption application is closed without further action.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations