



2008-04A
ERISA SEC
404(b)

Michael A. Lawson, Esq.
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300 South Grand Avenue
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Dear Mr. Lawson:

This is in response to your request for an advisory opinion concerning the indicia of ownership requirements in section 404(b) of the Employee Retirement Income Security Act of 1974 (ERISA), and the implementing regulations. Your request concerns the use of "Multinational Cross-Border Pooling Products" or "MCBPPs" designed by Northern Trust Company (Northern Trust) for multi-national corporations and affiliates (Multinational Client). An MCBPP allows the pension plans (Plans) of a Multinational Client, which may be located in different international jurisdictions, to pool their investments into a single entity for investment purposes.

You make the following representations.

Northern Trust Corporation (NTC) is a multi-bank holding company headquartered in Chicago, Illinois, that provides financial services through its principal wholly-owned subsidiary, Northern Trust, a banking corporation (as defined in section 202(a)(2) of the Investment Advisers Act of 1940). Northern Trust is organized under the laws of the State of Illinois, with its principal place of business in Chicago. NTC directly or indirectly owns other bank branches and bank subsidiaries, including those located in Toronto, London, Singapore, Guernsey, and Grand Cayman. Bank branch offices of Northern Trust, including those outside of the U.S., are not separate legal entities, but are part of Northern Trust and are subject to regulation and supervision by the State of Illinois and U.S. federal authorities that have examination and supervisory authority over banks. Bank branch offices of Northern Trust that are located outside the U.S. are also subject to regulation by the governmental agency or regulatory authority in the foreign jurisdiction having authority over such branch offices. For purposes of this request, you state that references to Northern Trust include branch offices of Northern Trust in foreign jurisdictions.

NTC also directly or indirectly owns several investment management subsidiaries, including Northern Trust Investments, N.A., and Northern Trust Global Advisors, Inc. As of June 30, 2007, NTC had assets under custody of over \$4.0 trillion, and assets under investment management of approximately \$766.5 billion.

An MCBPP is an offshore pooled investment vehicle that may be organized as any of several types of legal entities (Pooled Vehicles) in any of several foreign jurisdictions. To date, there are no Plans subject to Title I of ERISA (ERISA Plans) that have participated in an MCBPP. Pooled Vehicles currently in use or under consideration include those organized in Ireland, as either common contractual funds (CCFs), variable capital companies (VCCs), or Irish unit trusts (IUTs), or in Luxembourg, as either *fonds communs de placement* (FCPs) or *societes' d'investissement à capital variable* (SICAVs). Northern Trust may use other structures as the MCBPP concept continues to develop. Each Pooled Vehicle will be operated in compliance with the securities laws of all jurisdictions in which the MCBPP will be marketed.

You represent that the laws of each of the above referenced jurisdictions require each Pooled Vehicle that is an unincorporated vehicle, such as an Irish CCF or a Luxembourg FCP, to have a "management company" (Management Company) that is duly qualified and licensed to act under the laws of the jurisdiction in which the Pooled Vehicle is organized. Each Multinational Client will designate for its MCBPP a Management Company that may be either an entity formed and controlled by the Multinational Client or a direct or indirect wholly-owned subsidiary of NTC. Incorporated Pooled Vehicles, such as an Irish VCC and a Luxembourg SICAV, are investment companies that have a board of directors in accordance with local law (Board of Directors). The members of any such Pooled Vehicles' Board of Directors will be independent of Northern Trust and its affiliates.

Pooled Vehicle Sub-Funds Holding "Plan Assets"

Each Pooled Vehicle will have one or more sub-funds (Sub-Funds) that have different investment objectives or eligible investments. The Plans of a particular Multinational Client may independently invest varying amounts of their assets in a Sub-Fund. Any Pooled Vehicle Sub-Fund in which one or more ERISA Plans invest is referred to herein as an "ERISA Sub-Fund." Any decision to invest assets of an ERISA Plan in an ERISA Sub-Fund will be made by a Plan fiduciary that is independent of Northern Trust and its affiliates.

Under the proposed MCBPP structure, you state that the assets of each ERISA Sub-Fund would be considered "plan assets" of an investing ERISA Plan under section 3(42) of ERISA¹ and the U.S. Department of Labor's current regulation at 29 C.F.R. § 2510.3-101.² As a result, an undivided fractional interest of each of an ERISA Sub-Fund's assets

¹ As amended by section 611(f) of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 972.

² The Department is providing no opinion herein as to whether assets of the MCBPP, in any particular instance, will be considered "plan assets" subject to ERISA, as such a finding would be outside the scope of this request.

would be treated as subject to the fiduciary responsibility provisions of Title I of ERISA and the prohibited transaction provisions imposed under Title I of ERISA and section 4975 of the Internal Revenue Code of 1986, as amended (the Code).

Thus, you represent that all persons with discretionary authority or control over the assets of an ERISA Sub-Fund, or who exercise authority or control over its assets (including a custodian), and those who provide investment advice for a fee regarding such assets, would be treated as fiduciaries under ERISA,³ and would be subject to potential liability under ERISA⁴ for any violations of ERISA with respect to such assets.⁵ You state that all of the Pooled Vehicles or Sub-Funds that are deemed to hold “plan assets” under ERISA will be designed to operate in compliance with the fiduciary responsibility and other provisions of ERISA.

Global Custodians, Local Custodians and Sub-custodians

Pooled Vehicles must have a local custodian (Local Custodian) that is appointed by the Management Company or the Board of Directors. The Local Custodian will be either Northern Trust or another direct or indirect wholly-owned subsidiary of NTC that is duly qualified and licensed to act in the local jurisdiction. Northern Trust will serve as the global custodian (the Global Custodian) of each Pooled Vehicle and in such capacity will maintain responsibility for custody of all the Pooled Vehicle’s assets. If Northern Trust is the Local Custodian of a Pooled Vehicle, then it will serve as Global Custodian by virtue of its status as Local Custodian. If Northern Trust is not the Local Custodian of a Pooled Vehicle, then it will be appointed as Global Custodian by a direct or indirect wholly-owned subsidiary of NTC. When serving as Local Custodian or Global Custodian, Northern Trust may act through one or more of its non-U.S. branches.

The Global Custodian will either act as, or will appoint, a local sub-custodian in each country in which assets of a Pooled Vehicle are to be held (Sub-custodians). The indicia of ownership of assets held in the U.S. will be held in the custody of Northern Trust in Illinois, as the Sub-custodian, or may be held in the U.S. by appropriate domestic clearing agencies, the Federal Reserve Bank, or other appropriate entities that act as agent for Northern Trust. The indicia of ownership of assets consisting of foreign securities or foreign currencies in all other markets will be held in the custody of (1) a Northern Trust branch, (2) a direct or indirect wholly-owned subsidiary of NTC that is a foreign bank, foreign clearing agency or foreign securities depository that has

³ Section 3(21) of ERISA and regulations at 29 C.F.R. § 2510.3-21(c).

⁴ Section 409 of ERISA (liability for breaches of fiduciary duty).

⁵ *E.g.*, section 404(a)(1) of ERISA (requiring fiduciaries to act prudently and for the exclusive benefit of plan participants and beneficiaries) and section 406 of ERISA (avoidance of prohibited transactions). In general, the Department notes that fiduciaries for a MCBPP would be subject to all provisions of Part 4 of Title I of ERISA, including the trust requirements of section 403(a) and the bonding provisions of section 412.

contractually agreed to act as agent on behalf of Northern Trust, or (3) a foreign bank, foreign clearing agency or foreign securities depository unaffiliated with Northern Trust that has contractually agreed to act as an agent of Northern Trust, as discussed below.

Use of Foreign Banks, Foreign Securities Depositories and Foreign Clearing Agencies

Northern Trust, in its role as Global Custodian, may permit Sub-custodians to hold the indicia of ownership of foreign assets in foreign banks, foreign securities depositories and foreign clearing agencies in various foreign jurisdictions, when such assets are not held by a Northern Trust branch office. Each foreign bank, foreign securities depository, and foreign clearing agency will be supervised or regulated by a government agency or regulatory authority in the foreign jurisdiction having authority over such entity and will hold the indicia of ownership of foreign assets as agents of the Global Custodian.

When a Sub-custodian that is a foreign bank, foreign securities depository, or foreign clearing agency holds the indicia of ownership of foreign assets, the Global Custodian will be liable to each ERISA Plan participating in a Pooled Vehicle to the same extent it would be if it had retained the physical possession of the indicia of ownership within the U.S. The indicia of ownership of the foreign assets of any ERISA Sub-Fund will not be subject to any right, charge, security interest, lien or claim of any kind in favor of the foreign Sub-custodian, except for their safe custody or administration.

Beneficial ownership of the foreign assets of any ERISA Sub-Fund represented by such indicia of ownership will be freely transferable without payment of money or value other than for safe custody or administration. Upon request by the independent ERISA Plan fiduciary who consents to appointment of the Global Custodian, the Global Custodian will identify to such fiduciary the name, address and principal place of business of the foreign entity which acts as custodian for the Pooled Vehicle, and the name and address of the government agency or other regulatory authority that supervises or regulates that foreign entity.

Record-keeping and Reporting Available to Plan Fiduciaries

You state that two levels of reporting would also be available to Plan fiduciaries and other appropriate parties (*e.g.*, a federal court with jurisdiction over a matter relating to a Plan's assets) with respect to a Plan's investment in an ERISA Sub-Fund or Pooled Vehicle. First, appropriate account statements of each ERISA Sub-Fund would set forth the ownership interest of each investing Plan. The information contained on the Plan-level account statements would consist of a statement of the number of units of each Sub-Fund held by the Plan and the value of such units. Second, the underlying investments of each Sub-Fund in which the Plan invests would be set forth on separate

account statements. The information contained in each Sub-Fund-level account statement would consist of a detailed statement listing the total position and market value of each asset owned by the Sub-Fund.

If a Plan fiduciary or other appropriate party desires to determine a Plan's percentage ownership interest in an ERISA Sub-Fund, a report containing that information would be provided upon request. The information compiled in both the Plan-level account statements and Sub-Fund level account statements would be assembled in accordance with Northern Trust's general business practices.

All of the above account statements and reports will be available to the fiduciaries of ERISA Plans and other appropriate parties (e.g., a U.S. District Court with jurisdiction over a matter relating to the Plan's assets) from Northern Trust. Thus, Plan fiduciaries will be able to access detailed ERISA Plan-level account statements at any time. In addition, Plan fiduciaries will be provided with copies of ERISA Sub-Fund-level account statements and the Plan percentage ownership report upon request.

You make the following specific representations relating to the indicia of ownership for relevant plan assets.

U.S. Securities

Northern Trust would serve as the Sub-Custodian of all U.S. securities of the Pooled Vehicle or ERISA Sub-Fund. The U.S. securities would be held in the U.S. within the jurisdiction of the U.S. District Courts.

U.S. Currency

Any U.S. dollar denominated cash that has not otherwise been invested by an ERISA Sub-Fund's investment managers, received through the issuance of dividends, interest payments, sale proceeds or otherwise, will be swept daily into an off-balance sheet cash investment vehicle established and maintained by Northern Trust for its clients. This cash-sweep vehicle is the NT Global Funds PLC, an Irish Qualifying Investor Fund or "QIF" organized under the laws of Ireland (the NT Global Funds). You state that interests of an ERISA Sub-Fund in the NT Global Funds would be a "foreign security" that would be held by Northern Trust in the same manner as other foreign securities as noted below. ERISA Plans will hold less than 25% of any class of outstanding equity interests in the NT Global Funds. Remaining equity interests will be held by clients of Northern Trust and its affiliates that are not affiliated with the Multinational Client and are not benefit plan investors for purposes of any ERISA plan asset "look-through"

analysis. Thus, you represent that the underlying assets of the NT Global Funds will not be considered “plan assets” under section 3(42) of ERISA.⁶

Foreign Currency and Foreign Securities

Any foreign securities and foreign currency, to the extent such assets are not held by Northern Trust in the U.S., would be maintained by Northern Trust in the custody of entities meeting the requirements of regulations issued by the Department under ERISA section 404(b), as discussed further below.

Advisory Opinion Requested

You request an opinion that the proposed arrangements by Northern Trust for maintaining the indicia of ownership of “plan assets” held by a Pooled Vehicle or ERISA Sub-Fund, relating to the MCBPP structure discussed above, would be in compliance with the requirements of section 404(b) of ERISA and the Department's regulation at 29 C.F.R. § 2550.404b-1.

Relevant Law, Analysis and Conclusion

Section 404(b) of ERISA provides that no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the District Courts of the U.S., except as authorized by the Secretary of Labor by regulation.⁷ The Department promulgated such regulations at 29 C.F.R. § 2550.404b-1.

U.S. Securities

With respect to U.S. securities, you represent that the indicia of ownership for relevant plan assets in a Pooled Vehicle or ERISA Sub-Fund would be held by Northern Trust, as the authorized Sub-custodian, within the jurisdiction of the U.S. District Courts or held in the U.S. by appropriate domestic clearing agencies, the Federal Reserve Bank or other

⁶ The Department is providing no opinion herein as to whether assets held by the NT Global Funds would be “plan assets” subject to Title I of ERISA.

⁷ In the ERISA Conference Report, Congress noted its intent to prevent so-called “runaway assets” and stated that the basic objective of the requirement that the indicia of ownership remain within the jurisdiction of a United States District Court is to preclude frustration of adequate fiduciary supervision and remedies for breach of trust. However, the risk of misappropriation of plan assets and their removal beyond the effective process of an American court is minimal where the assets are under the *management or control* of a bank, trust company or similar institution which is subject to adequate regulation and examination by State or Federal supervisory agencies. Such an institution would be responsive to legal process and to traditional principles of fiduciary responsibility under trust law. See H.R. Rep. No. 93-1280, 93rd Cong., 2nd Sess., at 306 (1974) (emphasis added).

appropriate entities that act as agent for Northern Trust. Therefore, it is the opinion of the Department that the requirements of ERISA section 404(b) would be met.

Foreign Securities and Foreign Currencies -- Non-U.S. Branches of Northern Trust

Regulation section 2550.404b-1(a)(2)(ii)(A) provides that the indicia of ownership of certain "securities" or "currencies" issued by non-U.S. entities may be held outside the jurisdiction of the U.S. District Courts if the indicia of ownership are, among other things, in the physical possession of, or (as a result of normal business operations) are in transit to the physical possession of, a person which is organized under the laws of the U.S. or a State and has its principal place of business in the U.S. In this regard, section 2550.404b-1(a)(2)(ii)(A)(1) states that such a person can be a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 (the Advisers Act), that meets certain equity capital requirements, as described therein.

With respect to foreign securities (including interests in the NT Global Funds which you represent are foreign securities) and foreign currencies, you represent that the indicia of ownership for relevant plan assets, to the extent not held by Northern Trust in the U.S., would be held, in many cases, outside the jurisdiction of U.S. District Courts in non-U.S. branches of Northern Trust as a Local Custodian or Global Custodian. You represent that Northern Trust is a banking corporation (as defined in section 202(a)(2) of the Advisers Act) with its principal place of business in Chicago, Illinois. You also represent that bank branch offices of Northern Trust, including those outside of the U.S., are not separate legal entities, but are part of Northern Trust and are subject to regulation and supervision by the State of Illinois and U.S. federal authorities that have examination and supervisory authority over banks. On the basis of your representations, it is the opinion of the Department that a non-U.S. branch of Northern Trust would constitute a bank within the meaning of section 2550.404b-1(a)(2)(ii)(A)(1) which holds the indicia of ownership of foreign securities and currencies as the Local and Global Custodian of a Pooled Vehicle or ERISA Sub-Fund relating to the MCBPP structure you describe within the meaning of section 2550.404b-1(a)(2)(ii)(A).

Foreign Securities and Foreign Currencies - Affiliated and Unaffiliated Foreign Banks, Foreign Securities Depositories and Foreign Clearing Agencies

In addition, regulation section 2550.404b-1(a)(2)(ii)(C) would permit a bank described in section 2550.404b-1(a)(2)(ii)(A)(1) (e.g., Northern Trust) to maintain the indicia of ownership of plan assets that are foreign securities or foreign currencies (as described in section 2550.404b-1(a)(1)) in the custody of an entity that is a foreign securities depository, foreign clearing agency which acts as a securities depository, or foreign bank, if such entity is supervised or regulated by a government agency or regulatory authority in the foreign jurisdiction having authority over such depositories, clearing agencies or banks, provided that the following five conditions are met: (1) the foreign

entity must hold the indicia of ownership as agent for the bank; (2) the bank must be liable to the plan to the same extent it would be if it retained the physical possession of the indicia of ownership within the U.S; (3) the indicia of ownership must not be subject to any right, charge, security interest, lien or claim of any kind in favor of the foreign entity except for their safe custody or administration; (4) the beneficial ownership of the assets represented by the indicia of ownership must be freely transferable without the payment of money or value other than for safe custody or administration; and (5) upon request by the plan fiduciary who is responsible for the selection and retention of the bank, the bank must identify the name, etc. of the foreign custodial entity and of the governmental agency or other authority that supervises or regulates that entity.

You represent that Northern Trust, in its role as Global Custodian, may permit Sub-Custodians to maintain the indicia of ownership of foreign assets in the custody of foreign banks, foreign securities depositories and foreign clearing agencies in various foreign jurisdictions. These entities will be either affiliated or unaffiliated with Northern Trust. You also represent that each such entity will be supervised or regulated by a governmental agency or regulatory authority in the foreign jurisdiction having authority over such entity and will hold the indicia of ownership of foreign assets as an agent of the Global Custodian. Further, you represent that the remaining conditions of section 2550.404b-1(a)(2)(ii)(C) of the regulation will be satisfied.

The Department notes that questions relating to whether all conditions and other provisions necessary for compliance with 29 C.F.R. § 2550.404b-1 are met is an inherently factual question upon which the Department cannot opine. If, however, those conditions are in fact satisfied in accordance with your representations, it is the opinion of the Department that Northern Trust could utilize the custody services of a foreign bank, foreign clearing agency, or foreign securities depository, whether affiliated or unaffiliated with Northern Trust, to maintain the indicia of ownership of foreign securities and foreign currencies held by a Pooled Vehicle or ERISA Sub-Fund relating to the MCBPP structure you describe outside the jurisdiction of the District Courts of the U.S.

Finally, it should be noted that you are not requesting, and the Department is not providing, any opinion at this time as to whether other forms of assets held by a Pooled Vehicle that are not described herein or in 29 C.F.R. § 2550.404b-1(a) would meet the indicia of ownership requirements of ERISA section 404(b). The Department is also not providing an opinion regarding any other compliance issues that may arise under the prohibited transaction or general fiduciary responsibility provisions of Part 4 of Title I of ERISA. As you know, ERISA section 404(a)(1) requires, among other things, that a plan fiduciary act with the care, skill, prudence, and diligence under circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Thus, while arrangements described herein may be permissible under section 404(b) for “plan

assets" noted above, the Department is not providing an opinion as to general fiduciary duties of prudence and diversification under section 404(a)(1) of ERISA, relating to investments made by ERISA Plans in off-shore investment vehicles.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 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.

Sincerely,

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