



January 13, 2009

Donald J. Myers, Esq.
Reed Smith LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, DC 20005-3373

2009-01A
ERISA SEC.
408(b)(4) & 406(b)(3)

Dear Mr. Myers:

This is in response to your request for an advisory opinion on behalf of AmeriServ Trust and Financial Services Company (ATFSC) concerning the application of section 408(b)(4) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the parallel provisions under section 4975(d)(4) of the Internal Revenue Code of 1986, as amended (the Code),¹ to the use of deposit accounts of its banking affiliate for investment of cash of certain bank collective investment funds for which it serves as trustee, under the circumstances as described herein.

You make the following representations.

ATFSC is a Pennsylvania state chartered trust company with its principal offices in Johnstown, Pennsylvania, and is a wholly-owned subsidiary of AmeriServ Financial, Inc., a bank holding company. ATFSC is supervised by the Commonwealth of Pennsylvania Department of Banking and, through its parent, by the Board of Governors of the Federal Reserve (Federal Reserve).

ATFSC serves as the trustee of two series of real estate funds in which various Taft-Hartley employee benefit plans (Client Plans) subject to ERISA are invested. These funds are the Building Union Investment and Local Development (BUILD) Funds and the Employees Real Estate Construction Trust (ERECT) Funds. Currently, there are four separate funds within the BUILD Funds and three separate funds within the ERECT Funds, all of which are intended to invest in real estate projects that meet certain investor-approved investment objectives and underwriting criteria within particular geographic areas. In each arrangement, ATFSC works with a real estate advisor to identify potential real estate projects and conduct due diligence while retaining final approval authority over all investments.

¹ Under 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 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.

The BUILD Funds are bank collective trust funds intended to meet applicable requirements of the Code (e.g., Code section 584). Their respective declarations of trust also authorize ATFSC, as trustee, to keep a portion of the trust fund in cash or cash equivalents as the trustee may from time to time deem to be in the best interest of the trust, and further authorize the transfer of such portion of the trust fund in cash, as the trustee may deem to be in the best interest of the trust, into money market accounts or other interest bearing deposit accounts of the trustee or any affiliate of the trustee.

The ERECT Funds are bank collective investment funds. Two of the three ERECT Funds are established as tax-exempt group trusts under IRS Revenue Ruling 81-100, as amended. The declarations of trust for such ERECT Funds authorize ATFSC, as trustee, to invest assets awaiting investment, or that are required to be maintained in more liquid investment vehicles for other purposes (such as to meet withdrawal requests), in certificates of deposit or time and savings deposits, whether issued by the trustee or its affiliates or by any other issuer, provided that such deposits of the trustee or its affiliates bear a reasonable rate of interest. The third declaration of trust, established under section 584 of the Code, authorizes ATFSC, as trustee, to deposit cash for interest with any banking or savings institution, including the banking department of the trustee or any affiliate, provided that such deposits are limited to funds awaiting distribution or investment.

Pursuant to these provisions, a portion of the assets of the BUILD Funds or ERECT Funds (collectively, the Funds) is invested, from time to time, in cash and cash equivalents while waiting for investment in real estate projects or distribution to investing Client Plans. Prior to February 2005, such cash assets were invested in the SEI Daily Income Trust Prime Obligation Portfolio Class A Fund (the SEI Fund), a money market mutual fund whose underlying assets are generally commercial notes. ATFSC is not affiliated with SEI. For approximately a year prior to February 2005 there was a large build-up of cash in the Funds, up to \$60 million, due to the premature payoff or purchase of investments or projects by owners or development partners and the limited availability of acceptable new real estate investments.

In early 2005, ATFSC management searched for a way to achieve higher returns on the large amount of built-up cash in the SEI Fund. You state that the president and chief executive officer of ATFSC, Ronald Virag (Mr. Virag), discussed the matter with management of ATFSC's affiliate AmeriServ Financial Bank (the Bank), another wholly-owned subsidiary of AmeriServ Financial, Inc. Mr. Virag asked the personnel at the Bank if they would consider offering a money market fund at a competitive rate with the SEI Fund. In response, the Bank agreed to offer to ATFSC a money market deposit account covered by Federal Deposit Insurance Corporation (FDIC) insurance, up to applicable amounts, with an interest rate that would be five basis points (0.05%) more than the SEI Fund on an annualized basis. ATFSC further negotiated to have any funds

in excess of the FDIC insured amount in the deposit account, up to 102% of the total value of such deposits, protected by collateralization using low-risk government and/or government agency bonds held by the Bank.

You state that ATFSC's Chief Trust Investment Officer then reviewed the Bank's proposed money market deposit account investment on behalf of the BUILD and ERECT Funds, taking into consideration the investment's anticipated return, safety, liquidity, and diversification in comparison to other available institutional money market funds. He approved use of the Bank's deposit account as a temporary cash equivalent investment for the Funds, concluding that such investment would be in the best interest of the Fund investors. You state further that this determination was based on, among other things, the anticipated return of such deposit account being higher than other institutional money market funds, the higher degree of safety for the deposit account due to FDIC insurance and the collateralization, the higher return for the deposit account when compared to other types of funds providing a similar degree of safety - e.g., money market funds holding government bonds, and the more immediate access of ATFSC to the deposit account due to the monies being held by an affiliated bank (i.e., the Bank) as opposed to a third-party money market fund.

As a result, in February 2005, ATFSC began investing cash assets of the BUILD and ERECT Funds in a newly-created "Specialty Trust Money Market Account" (STMMA), a deposit account established by the Bank only for ATFSC and its clients. The interest rate on the STMMA (subject to a minimum balance) was based on, and designed to exceed, the one-day yield rate of the SEI Fund by being adjusted on the first business day of each week to add five basis points to the SEI Fund's interest rate on the 1st business day of the prior week. The objective for establishing such a rate of return for the STMMA was to ensure that the BUILD and ERECT Funds would receive an investment return at least comparable to what they previously had been receiving from SEI.

Neither the Bank nor any of its affiliates received, or will receive, fees or any other compensation as a result of the Funds' investments in the STMMA. Thus, you state that the only benefit to the Bank as a result of the Funds' investments in the STMMA was the Bank's ability to reduce its borrowing needs, and therefore its interest expenses, as a result of having greater access to capital to meet the Bank's reserve requirements under Federal banking law.²

² See Regulation D, as promulgated by the Federal Reserve, at 12 CFR Part 204. Pursuant to these rules, a bank is required to maintain certain reserve amounts against its transaction accounts and non-personal time deposits once such amounts exceed a specified threshold. To the extent that a bank does not have sufficient reserves, it may obtain advances for which interest is charged from a Federal Reserve Bank or Federal Home Loan Bank to meet the reserve requirements.

You represent that certain concerns have been expressed about whether the past transfer of Fund monies from the SEI Fund, an unaffiliated money market fund, to the Bank's STMMA, as discussed above, was a prohibited transaction under section 406 of ERISA, not otherwise covered by the statutory exemption for plan investments in bank deposits contained in section 408(b)(4) of ERISA. Specifically, because the regulations under section 408(b)(4) clarify that section 408(b)(4) does not provide relief for violations of section 406(b)(3), you request an advisory opinion as to whether investments of Fund assets in the STMMA, and the resulting benefits to the Bank from any reductions in its borrowing needs that were necessary to meet its reserve requirements under Federal banking law at the time of such investments, are considered to be violations of section 406(b)(3) of ERISA.

Section 406(a)(1) of ERISA prohibits, in pertinent part, a fiduciary with respect to a plan from causing the plan to engage in a transaction if such fiduciary knows or should know that the transaction constitutes a direct or indirect sale or exchange of any property between the plan and a party in interest, or the transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. In addition, section 406(b)(1) and (b)(2) of ERISA provide, in part, that a fiduciary with respect to a plan shall not deal with the assets of the plan in his or her own interest or for his or her own account, or act in his or her own capacity 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.

However, section 408(b)(4) of ERISA states, in pertinent part, that the prohibitions of section 406 shall not apply to the investment of all or a part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if - (A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or (B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

A regulation issued by the Department at 29 CFR § 2550.408b-4 explains that section 408(b)(4) provides an exemption from sections 406(a)(1), (b)(1) and (2), if certain conditions are met, but does not provide an exemption from the prohibitions of section 406(b)(3) or general fiduciary duties described in section 404(a) of ERISA.

The term "deposits" as used in section 408(b)(4) is defined at regulation 29 CFR § 2550.408b-4(c)(3) to include any account, temporary or otherwise, upon which a reasonable rate of interest is paid, including a certificate of deposit issued by a bank or similar financial institution. Based upon your representations, we believe that

investments of cash assets by the BUILD and ERECT Funds in the STMMA, as described above, are “deposits” within the meaning of this section of the regulations.

Under the facts presented, the Department believes that investments made by ATFSC, as fiduciary of the Funds, in the Bank’s deposits are entitled to the relief offered by section 408(b)(4) from the prohibitions of sections 406(a), 406(b)(1) and (b)(2). In general, the Department notes that Congress, when it included section 408(b)(4) in ERISA, intended to allow plan investments in bank deposits, if specifically authorized (as described therein), even though the bank is a fiduciary or other party in interest to such plan. See 29 CFR § 2550.408b-4.

As noted above, the Department’s regulation at 29 CFR § 2550.408b-4 explains that section 408(b)(4) does not provide an exemption from any violation of section 406(b)(3). In this regard, section 406(b)(3) of ERISA prohibits a plan fiduciary from receiving any consideration for such fiduciary’s own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan. The Department’s regulation at 29 CFR § 2550.408b-2(e) further provides that a fiduciary may not use its fiduciary authority or control 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 that 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.

The Bank is a person in which ATFSC has an interest that may affect its best judgment as a fiduciary. However, to the extent the Bank received the benefit or consideration of decreased borrowing needs from a Federal Reserve Bank or the Federal Home Loan Bank to meet its reserve requirements under Federal banking law by ATFSC directing a deposit of money into the STMMA, that benefit or consideration to the Bank would not be received from a party which itself was dealing with the plan within the meaning of section 406(b)(3). As a result, the Department does not believe that a violation of section 406(b)(3) occurred under the facts presented.

The Department notes further that the exemption provided by section 408(b)(4) does not provide an exemption from general fiduciary duties as stated in Part 4 of Title I of ERISA. Specifically, section 404(a) of ERISA requires, in pertinent part, that a fiduciary shall discharge its duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to such participants and beneficiaries, and defraying reasonable expenses of administering the plan; with the care, skill, prudence, and diligence under the 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; and in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Title I of ERISA. In this regard, the Department expresses no opinion on the issue of whether and to what

extent the investments by ATFSC, as trustee of the BUILD and ERECT Funds, of the Funds' assets in the Bank's STMMA, was consistent with the fiduciary duties set forth in section 404(a) of ERISA, as such determinations are inherently factual.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this 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