



July 20, 2012

Mr. Brian Berglund
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2012-05A
ERISA SEC
407(d)(4) & 408(e)

Dear Mr. Berglund:

This is in response to an advisory opinion request submitted on behalf of Anheuser-Busch Companies, Inc. (A-B). The request concerns whether certain transactions involving parcels of "employer real property" that are contributed to, or sold by, the Master Pension Trust for Certain Defined Benefit Plans of Anheuser-Busch Companies, Inc. and its subsidiaries (Master Pension Trust) would violate the prohibited transaction provisions of section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Facts and Representations

A-B established the Master Pension Trust for the purpose of holding assets for participating plans sponsored by A-B and certain wholly-owned subsidiaries (the A-B Plans). Currently, eight A-B Plans participate in the Master Pension Trust. All are defined benefit plans within the meaning of section 3(35) of ERISA and covered by Title I of ERISA.

On March 23, 2010, Anheuser-Busch Wholesaler Development Corp. (ABW), a wholly-owned subsidiary of A-B, and Anheuser-Busch, Inc. (ABI) contributed eight parcels of improved real property (Property or Properties) to the Master Pension Trust. Specifically, ABW contributed two of the Properties, located in Pomona, California and Lancaster, California. ABI contributed the remaining six Properties, located in Sylmar, California; Carson, California; Denver, Colorado; Louisville, Kentucky; Medford, Massachusetts; and Tulsa, Oklahoma. Eight limited liability companies (LLCs), in each of which the Master Pension Trust is the sole member, were created to acquire and hold each of the Properties. An independent real estate valuation firm determined the fair market value on March 23, 2010, and you state that each A-B Plan's share of the total value of the Properties did not exceed the statutory limitation under section 407(a)(2) of ERISA, as applied to each A-B Plan.

You represent that each Property is the site of a warehouse that could be used or easily adapted for any type of warehouse/ distribution operation. You also state that, with minor modifications, these Properties could accommodate other operations, such as assembly businesses or service businesses (e.g., collision repair).

Concurrently with the contribution of each Property to the Master Pension Trust, ABW and ABI executed a separate lease (Lease) with the corresponding transferee LLC. Each Lease is a triple net lease for a term of 20 years, subject to the right of the lessee to extend the term for two additional periods of five years each. You represent that the Properties are “qualifying employer real property” (QERP) within the meaning of section 407(d)(4) of ERISA. You also represent that the contributions of the Properties to the Master Pension Trust and the lease back of the Properties to ABW or ABI satisfied the requirements of the statutory exemption in ERISA section 408(e).

A-B is in the process of determining whether ABW, ABI, or any other wholly-owned subsidiary of A-B will contribute additional parcels of employer real property to the Master Pension Trust. Any such additional property would be transferred to, and leased back from, an LLC of which the Master Pension Trust would be the sole member. You also represent that at some point a single parcel of the Properties held in the Master Pension Trust may be sold to ABW, ABI or any other wholly-owned subsidiary of A-B. You represent that any additional contribution or sale may be limited to a single parcel of employer real property or to a small number of parcels.

Issue Presented

You ask whether the contribution by ABW or ABI of an additional parcel of employer real property, as defined in ERISA section 407(d)(2), to the Master Pension Trust would be a prohibited transaction under section 406 of ERISA that would not satisfy the requirements of ERISA section 408(e). You are concerned that the Master Pension Trust's acquisition of a single additional parcel of employer real property would not be viewed as an acquisition of QERP because a single parcel could not meet the requirement that a substantial number of the parcels be dispersed geographically as required by ERISA section 407(d)(4)(A). If the additional parcel cannot be viewed as QERP, the contribution would not satisfy the statutory exemption contained in section 408(e) of ERISA.

For the same reason, you also ask whether a sale involving only a single parcel of the Properties by the Master Pension Trust to ABW or ABI would be a prohibited transaction under section 406 of ERISA that would not satisfy the statutory requirements of ERISA section 408(e). You are concerned that such a transaction would not be viewed as a sale of QERP because the single parcel would not meet the geographic dispersal requirement of section 407(d)(4) of ERISA.

Relevant Law and Analysis

ERISA section 406(a)(1)(A) provides, in relevant part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing of any

property between the plan and a party in interest. Section 406(b) of ERISA prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. The term “party in interest” is defined under section 3(14) of ERISA to include, among other things, an employer any of whose employees are covered by such plan. The term “fiduciary” is defined under section 3(21)(A)(i) as a person who exercises any authority or control respecting the disposition of plan assets. As a result, the contribution, leasing and sale of any real property between the Master Pension Trust and ABI and ABW would be prohibited by section 406 of ERISA.

However, section 408(e) of ERISA provides, in pertinent part, that the restrictions of sections 406 and 407 of ERISA shall not apply to the acquisition, sale or lease by a plan of qualifying employer real property –

- (1) if such acquisition, sale, or lease is for adequate consideration,
- (2) if no commission is charged with respect thereto, and
- (3) if –
 - (A) the plan is an eligible individual account plan (as defined in section 407(d)(3)), or
 - (B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, the lease or acquisition is not prohibited by section 407(a).¹

The Department’s regulation under ERISA section 408(e) (29 CFR §2550.408e) explains that an “acquisition” of QERP may occur by a purchase, contribution, or exchange of assets.

Section 407(d)(2) of ERISA defines the term “employer real property” as real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer.

Section 407(d)(4) of ERISA defines the term “qualifying employer real property” as parcels of employer real property –

- (A) if a substantial number of the parcels are dispersed geographically;
- (B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;
- (C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

¹ Section 407(a)(1)(B) of ERISA states that a plan may not acquire or hold any employer real property which is not qualifying employer real property. Section 407(a)(2) of ERISA provides that a plan may not acquire any qualifying employer real property if, immediately after such acquisition, the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 404(a)(1)(B) to the extent it requires diversification, and sections 404(a)(1)(C), 406, and subsection (a) of this section).

The purpose of requiring that a substantial number of the parcels of employer real property held by a plan be dispersed geographically is to prevent adverse economic conditions peculiar to one area from significantly affecting the economic status of the plan as a whole. H.R. CONF. REP. No. 93-1280, at 318 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5098. Whether a substantial number of parcels of employer real property are geographically dispersed for this purpose is an inherently factual determination upon which the Department will not opine. However, it is the view of the Department that whether any one parcel of employer real property defined under section 407(d)(2) of ERISA satisfies the requirements of section 407(d)(4)(A) of ERISA is determined by considering the plan's holdings in employer real property immediately after the transaction involving the parcel. Otherwise, a plan could never acquire or sell any single parcel of employer real property even if the other QERP requirements of section 407 of ERISA, besides section 407(d)(4)(A), would be met for the plan's holdings after the acquisition or sale.

As a result, it is the Department's view that a contribution of a single parcel of employer real property to the Master Pension Trust by ABW or ABI would involve the contribution of QERP provided that, immediately after the contribution, the parcel would be QERP within the meaning of section 407(d)(4) when it is combined with other parcels held by the Master Pension Trust on behalf of the A-B Plans. As such, the contribution would be exempt from the prohibited transaction provisions of section 406 of ERISA, provided the other conditions of section 408(e) of ERISA were met. With respect to the sale of a single parcel, the parcel would meet the geographic dispersal requirement for QERP if, immediately after the sale, the remaining parcels in the Master Pension Trust would together meet that requirement.

However, if the sale of the single parcel would cause the remaining parcels held by the Master Pension Trust on behalf of the A-B Plans to fail this geographic dispersal requirement, then the sale would result in a prohibited transaction under section 406(a)(2) because it would cause the Master Pension Trust on behalf of the A-B Plans to hold employer real property that the fiduciary knows or should know violates section 407(a). In order to avoid such a result, the Master Pension Trust would need to obtain an individual exemption for such prohibited transaction prior to the sale, pursuant to the Department's authority under ERISA section 408(a) of ERISA and the procedures at 29 CFR part 2570, subpart B. *See Prohibited Transaction Exemption Procedures*, 76 Fed. Reg. 66637, Oct. 27, 2011.

The Department notes that the sale of a parcel, or various parcels, of QERP by a pension plan would not necessarily adversely affect the designation of remaining parcels held by the plan as QERP. In this regard, a single parcel of employer real property held alone by a plan cannot be considered QERP. *See* Advisory Opinion 84-20A.

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