

November 13, 1975

Dear :

This is in reply to your inquiries concerning the coverage of the Profit Sharing Plan (Plan) under the Employee Retirement Income Security Act of 1974 (ERISA), which have been referred by our [city] Regional Office for reply.

According to the information furnished by you, the Plan was terminated in January, 1974, due to merger of two law firms. At such time, the assets of the related trusts were fully vested and frozen on behalf of the participants for pay out upon their subsequent death, disability, retirement, or other termination in accordance with the provisions of the Plan. The Plan and related trust were qualified under sections 401 and 501 of the Internal Revenue Code and the trust continues so qualified. It is your view that the frozen trust is not covered under the ERISA since there was no "plan" in existence on or after the enactment of the ERISA. Section 3(2) of the ERISA defines the term "employee pension benefit plan" or "pension plan" to mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plans, fund, or program provides retirement income to employees, or results in a deferral of income, by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan (emphasis added).

Based on the information in your letter the Plan has not terminated; only future employer profit sharing contributions have been terminated. The trust, which is part of the plan, continues in operation and the trust assets are retained to be paid to plan participants upon their subsequent death,

P/OPINION 75-16

disability, retirement, or other termination of service with the employer. To the extent that each participant's profit share is not distributed or otherwise made available to him until he terminates service with the employer, there is a deferral of income with respect to each participant. Thus, the frozen profit sharing trust constitutes an "employee pension benefit plan" or "pension plan" within the meaning of section 3(2) and is subject to Parts 1, 4 and 5 of Title I of the ERISA.

We are enclosing a copy of a regulation that was published in the Federal Register on August 15, 1975. Section 2520.104-3 thereof requires that a short form plan description consisting of the first two pages of Form EBS-1 (without schedules A,B, and C) and the signature page (item 3 only) should have been filed with the Department by August 31, 1975. Late filing of the short form plan description should be accompanied by a brief explanation of the delay in filing.

A revised and simplified version of the EBS-1 was published in the Federal Register of October 10, 1975, for comment. It is expected that the final version of the EBS-1 will be issued soon after the expiration of the comment period. Section 2520.104-3 of the August 15 regulation requires plan administrators to file the revised EBS-1 in full, as well as a copy of the summary plan description, by May 30, 1976. By the same date, a copy of the summary plan description must be furnished to the plan participants and beneficiaries.

You also would like to know to what extent Title II of the ERISA applies to this frozen trust. Title II is under the jurisdiction of the Internal Revenue Service. A copy of your November 14, 1974 letter and our reply is being sent to  
Internal Revenue Service, for direct  
reply to you.

Sincerely,