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October 21, 1975

Dear :

Your letter of January 10, 1975 to of the Regional Office has been referred to this office for reply. In your letter, you inquired whether a person who is both a trustee and a participant in an employee benefit plan should be considered to be a fiduciary with respect to the plan under section 404(c) of the Employee Retirement Income Security Act of 1974 (the Act) if such person is a trustee with respect to both his individual account and the individual accounts or other plan participants and beneficiaries.

Section 404(c) provides, generally, that a participant or beneficiary of a plan which provides for individual accounts and which permits participants and beneficiaries to exercise control over the assets of their accounts will not be deemed to be a fiduciary by reason of exercising such control with respect to his account. It further provides that no person who is otherwise a fiduciary with respect to the plan shall be liable under Part 4 of Title I of the Act for any loss, or by reason of any breach, which results from a participant's or beneficiary's exercise of such control.

Thus, a participant or beneficiary who exercises control over plan assets will not be deemed to be a fiduciary so long as such control relates only to assets in such participant's or beneficiary's individual account. However, if such person exercises control over assets in the individual accounts of other participants and beneficiaries, he will be deemed to be a fiduciary with respect to the plan, as that term is defined in section 3(21) of the Act.

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Your letter also inquires as to the applicability of the bonding provisions of section 412 of the Act to the person described above. Subject to certain exceptions, section 412(a) of the Act requires that every person who handles funds or other property of an employee benefit plan covered by Part 4 of Title I of the Act shall be bonded. The term "handles," as used in this context, is defined in 29 CFR 464.7 adopted under section 13 of the Welfare and Pension Plans Disclosure Act (a copy of which is enclosed herewith) and incorporated by reference in the temporary bonding regulation adopted under section 412 of the Act (40 FR 2203, January 10, 1975). Thus, if the trustee of the plan described in your letter handles plan assets within the meaning of 29 CFR 464.7, he or she should be bonded in accordance with the provisions of section 412 of the Act.

Finally, pursuant to your September 16, 1975 telephone conversation with _____ of my staff, I understand that you no longer require a copy of form EBS-1 for registration of pension and profit sharing plans as requested in your letter. This response has therefore been addressed solely to your substantive inquiries.

Sincerely,