P/OPINION 76-14

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March 17, 1976

Dear :

This is in response to your letter of July 2, 1975 wherein you requested a ruling relative to a proposed transaction involving the construction of a building by the [company #1] Inc. profit sharing plan and the leasing of the building to [company #2] Inc. Your letter also indicated that owned 566 of the 600 outstanding shares each of [#l] Inc. and [#2] Inc. You offered the opinion that "...the proposed lease of the proposed building would cause the real estate to be classified as qualifying real property, which includes real property leased by the plan to an employer of employees covered by the plan, since its improvements are suitable or readily adaptable to more than one use."

Section 406(a)(l) of the Employee Retirement Income Security Act (ERISA) prohibits certain transactions, whether direct or indirect between a plan and a party in interest. Because of the relationship between the plan, [#1] Inc. and [#2] Inc., it appears that the latter is a party in interest with respect to the plan pursuant to section 3(14) (G) of ERISA. Accordingly, the proposed leasing of the building to [#2] Inc. would be a prohibited transaction under section 406(a)(l)(a).

Section 408(e) would exempt the proposed leasing from the prohibitions of section 406 provided that the conditions under section 408(e) are satisfied. That section however is applicable to <u>qualifying</u> employer real property which is defined under section 407(d)(4) of the ERISA as follows:

> (4) The term qualifying employer real property means 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 such real property is leased to one lessee (which may be an employer or an affiliate of an employer) and

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

Based on the facts as submitted and our examination of the law, the real property involved in the proposed transaction appears to be employer real property as defined in section 407(d)(2) but is not qualifying employer real property as defined in section 407(d)(4). Specifically, the real property described herein fails to satisfy the requirement that qualifying employer real property relates to parcels (plural) of employer real property. In your particular case, a parcel (singular) of real property rather than parcels (plural) is involved. Accordingly, under section 407(d)(4)(A), these parcels must be geographically dispersed in substantial numbers. In your case, geographic dispersion in substantial numbers is an impossibility since a single parcel of real property is involved.

Although the definition of qualifying employer real property is presently under consideration for possible revision, at the present time the law dictates that the real property described herein would not be qualifying employer real property but instead would be employer real property. Thus, the provisions of 408(e) would not be applicable to the proposed transaction and would not exempt the transaction from the prohibitions of section 406.

Please excuse the delay in answering the question raised in your letter. Administrative duties associated with the implementation of the ERISA unfortunately have been the cause of this late response.

Sincerely,