

January 15, 1976

Dear :

This is in response to your letter of November 17, 1975, in which you posed the following questions pertaining to section 404 of the Employee Retirement Income Security Act of 1974 (the Act):

1. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account, may such participant invest in any investment permitted under the plan without being subject to the requirement set forth in section 404(a)(1)(B) of the Act?

2. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, may a participant or beneficiary engage in a transaction which is prohibited under section 406 of the Act with the assets in his account?

With regard to your first question, section 404(a)(1)(B) of the Act provides that subject to, inter alia, section 404(c), a fiduciary shall discharge his duties with respect to an employee benefit plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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." Section 404(c) provides, in relevant part, that in the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary of Labor), such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise. Therefore, the participant or beneficiary is not subject to the duty imposed on fiduciaries under section 404(a)(1)(B) of the Act in exercising control over the assets in his own account.

As you are aware, however, section 404(c) contemplates the issuance of regulations by the Secretary of Labor for determining what constitutes the exercise of control by a participant or beneficiary over the assets in his account. Such regulations have not yet been issued. However, in the absence of such regulations you may wish to consult the Conference Report accompanying the Act. (H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), at page 305), which provides some guidance for interpreting section 404(c) of the Act which may be helpful.

With regard to your second question, the issue you have raised is under consideration by the Department of Labor in conjunction with the development of regulations under section 404(c) of the Act. However, you should note that if a pension plan is a plan within the meaning of section 4975 (e) (1) of the Internal Revenue Code of 1954 (the Code), the prohibited transaction provisions set forth in section 4975 of the Code are applicable with respect to the plan. Section 404(c) of the Act applies by its terms only to the provisions of Part 4 of Title I of the Act. The interpretation of section 4975 of the Code is a matter within the jurisdiction of the Internal Revenue service. Accordingly, your inquiries in that regard should be addressed to the Internal Revenue Service.

Sincerely,