

May 19, 1976

Dear :

This is in response to your letter of March 2, 1976 concerning the application of section 3(18) of the Employee Retirement Income Security Act of 1974 (the Act) to the purchase of employer securities by an employee stock ownership plan (ESOP) proposed to be established by [company]. Your letter states that the proposed transaction would involve the purchase by the ESOP of a controlling block of [company] securities at a price significantly above the current and recent over-the-counter market quotations. You represent that such price is approximately equal to that which has been offered for the stock by third parties.

Based on these representations, you have inquired whether such price, which is in excess of public market quotations, for the purchase of a controlling block of publicly traded [company] securities, would be in excess of "adequate consideration" within the meaning of section 3(18) of the Act. Specifically, you have inquired whether the determination of "adequate consideration" in the instant case is governed by section 3(18)(A)(ii) of the Act or by section 3(18)(B) of the Act.

Section 3(18)(A) of the Act defines the term "adequate consideration" in the case of a security for which there is a generally recognized market as, in relevant part, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest. In the case of a security for which there is no generally recognized market, section 3(18)(B) of the Act defines the term "adequate consideration" as the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Department of Labor. The Department has not yet issued regulations under section 3(18) and does not, at the present time, contemplate making advance determinations as to adequate consideration in the case of individual purchases and sales of securities.

In the absence of regulations under section 3(18), a determination as to what constitutes "adequate consideration" must be made on a case basis by the plan trustees or the appropriate named fiduciaries in light of all the relevant facts and circumstances. However, your letter states that [company] securities are publicly traded in the over-the-counter market. Therefore, it is the view of the Department that, if there are current bid and asked prices quoted by persons independent of the issuer and of any party in interest, a plan may not purchase a controlling block of stock at a price greater than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer of any party in interest. See section 3(18) (A) (ii) of the Act.

Sincerely,