

June 10, 1976

Dear :

This is in reply to your letter of April 2, 1976, in which you inquire whether the sale by the Profit-Sharing Trust (the Trust) to Corporation (the Corporation) of the Corporation's stock constitute a prohibited transaction under section 406 (a) (1) (A) of the Employee Retirement Income Security Act of 1974 (the Act)..

Your letter represents that from 1971 to 1974 the Trust acquired 4,100 shares of the Corporation's stock in the over-the-counter market at a total cost of \$11,279, but that such shares have now lost their value as part of the Trust's portfolio. The Corporation has proposed to purchase these shares from the Trust at a price of \$2 per share, which price is the maximum bid received for the stock in public trading during the last two years. Your letter notes, however, that the bulk of the market transactions in the Corporation's stock during the last few years has involved either the Corporation or its principal stockholders.

Section 406(a) (1) (A) of the Act prohibits, in relevant part, a fiduciary with respect to a plan from engaging in a transaction which he knows or should know constitutes a direct or indirect sale of any property between the plan and a party in interest. Section 408(e) of the Act, however, provides, in relevant part, that section 406 shall not apply to the acquisition or sale by a plan of qualifying employer securities, (as defined in section 407 (d) (5) of the Act) if: (1) such plan is an eligible individual account plan (as defined in section 407(d) (3) fo the Act); (2) no commission is charged with respect to the acquisition or sale of such securities; and (3) the acquisition or sale is for adequate consideration.

Section 3(18)(A)(ii) of the Act defines the term "adequate consideration" in the case of a security for which there is a generally recognized market and which is not traded on a national securities exchange, as 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.

If there is a generally recognized market for the Corporation's stock, adequate consideration would be a price determined pursuant to the requirements of section 3(18)(A)(ii). 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), determinations as to adequate consideration must be made on a case by case basis by the plan trustees or the appropriate named fiduciaries in light of all the relevant facts and circumstances.

Sincerely,