

September 30, 1976

Dear :

This is in response to your letter of November 4, 1975 concerning the applicability of section 409(b) of the Employee Retirement Income Security Act of 1974 (the Act). Your letter apparently raises the question whether section 409(b) is intended to exonerate successor fiduciaries from liability for the acts of their predecessors which occurred prior to the passage of the Act.

In this regard, it is represented in your letter that there is a position of the Office of the Deputy Comptroller of the Currency for Trusts "with respect to documentation of a successor fiduciary showing either that the accounts of a predecessor fiduciary have been approved by a court having jurisdiction or that such accounts have been reviewed by the successor and found to be satisfactory". Your letter questions whether section 409(b) exonerates successor fiduciaries from this requirement.

As a general matter, it is the policy of the Labor Department not to respond substantively to hypothetical questions. The following information may, however, be helpful to you.

Section 409(b) of the Act provides that no fiduciary shall be liable with respect to a breach of fiduciary duty under Title I of the Act, if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary. Section 409(b) does not, however, exempt a fiduciary from carrying out his responsibilities to a plan imposed by various provisions of Part 4 of Title I of the Act. For example, although a fiduciary may not be liable under section 409 of the Act for the acts of predecessor fiduciaries, if he knows of a breach of fiduciary responsibility committed by a predecessor fiduciary he would be obligated to take whatever action is reasonable and appropriate under the circumstances to remedy such breach. Failure to take such action would constitute a separate breach of fiduciary responsibility by the successor fiduciary.

2

P/OPINION 76-95

With regard to the position taken by the Office of the Deputy Comptroller of the Currency for Trusts, your attention is directed to section 514(d) of the Act which provides, as here relevant, that nothing in Title I of the Act shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States or any rule or regulation issued under any such law.

I hope that this response will be helpful to you. If you have any further questions concerning this matter, please contact this office.

Sincerely,