P/OPINION 77-16

407(d)(4)

January 11, 1977

Re: (A) Profit Sharing Plan
(A) Pension Plan and Trust
(B) Profit Sharing Plan

Dear :

This is in response to your request for a determination contained in the above-referenced applications for exemption. In the applications, you inquire whether the single parcel of real property jointly held by the (A) Profit Sharing Plan and Trust, the (A) Pension Plan and Trust, and the (B) Profit Sharing Plan (the Plans) constitutes qualifying employer real property within the meaning of section 407(d)(4) of the Employee Retirement Income Security Act of 1974 (the Act). You further inquire whether the continued holding and leasing of the property by the Plans to (A) and (B) (the Employer) is prohibited by section 406 or 407 of the Act or whether the statutory exemption provided by section 408(e) of the Act is available for the lease arrangement.

If a favorable determination is not obtained from the Department of Labor (the Department) with respect to these issues, you request an administrative exemption under section 408(a) of the Act and section 4975(c)(2) of the Internal Revenue Code of 1954 (the Code). Finally, if an adverse determination is made with respect to the above requests, you request that the Plans be allowed a period in which to divest the subject real property.

Section 407(d)(4) of the Act defines the term "qualifying employer real property" to include parcels of employer real property if, among other things, a substantial number of the parcels are dispersed geographically. Such geographic dispersion must be sufficient so that adverse economic conditions peculiar to one area would not significantly affect the economic status of the plan as a whole. See H.R. Rep. No. 93-1280, 93rd Cong., 2nd Sess. 318 (1974).

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The applications submitted indicate that the only employer real property held by the Plans is an interest in the single parcel of property leased to the Employers. It is the position of the Department that one parcel or property, or an interest therein, would not meet the requirements of geographic dispersion set forth in section 407(d)(4), and therefore, would not constitute qualifying employer real property within the meaning of that section.

Section 406(a)(1)(A) of the Act prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction which he knows or should know constitutes a direct or indirect leasing of property between a plan and a party in interest. In addition, section 406(a)(2) of the Act prohibits, in relevant part, a fiduciary from permitting a plan to hold any employer real property if he knows or should know that holding such real property violates section 407(a) of the Act. Section 407(a) of the Act prohibits, among other things, a plan from holding any employer real property which is not qualifying employer real property.

Section 408(e) of the Act provides a statutory exemption from the prohibitions of sections 406 and 407 thereof for the acquisition, sale or lease by a plan of qualifying employer real property, if the conditions set forth therein are met. The exemption for lease transactions is available, however, only if the property held by the plan is qualifying employer real property within the meaning of section 407(d)(4) of the Act. Since the property leased to the Employers is not qualifying employer real property, the statutory exemption provided by section 408(e) would not be available.

The Department has reviewed the above-referenced applications for exemption from the prohibitions of section 406 and 407(a} of the Act and from the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1) of the Code and, on the basis of the facts submitted and representations made, has determined that it is unable to propose an exemption with respect to

the applications. Among the factors considered in our tentative decision not to propose the requested exemptions is the absence of independent safeguards for the protection of the plan participants and beneficiaries, the apparent illiquidity of the investment, the inherent conflict of interest involved in transactions of this type and the administrative difficulty or monitoring abuses which may occur in such transactions.

However, in view of the timing of the transaction and the burden which may be incurred by the Plans if they are required to immediately dispose of the property or terminate the lease arrangements, you may wish to consider filing a supplement to your request for a limited transitional exemption to permit the disposition of the property or termination of the leases within a relatively short period of time which would include information in support of the requested exemption and specify the minimum period of time necessary to dispose of the property or terminate the leases and the reasons therefor.

Section 5 of ERISA Proc. 75-1, (40 F.R. 18471, April 28, 1975) provides that an applicant is entitled to a conference in Washington, D.C., in the event that the Department contemplates not proposing the requested exemption. If you desire a conference, please contact Room C-4508, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202) 523-6855, within 30 days from the date of this letter to arrange for the time and place of the conference. The conference will be a joint conference with representatives of both the Department and the Internal Revenue Service. At the conference you should be prepared to discuss any matter which you believe will support a decision to publish the requested exemptions for comment. Any information or arguments that you want considered with regard to the reference applications should be submitted in writing no later than five days before the scheduled time and date of the conference to the addresses set forth in section 4.01 of the ERISA Proc. 75-1, and Rev. Proc. 75-26.

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In the event that you do not request a conference or submit additional information in support of your applications within 30 days from the date of this letter, you will be notified that a final decision has been made not to propose the requested exemptions and that the application files have been closed.

Sincerely,