U.S. Department of Labor
Labor Management Services Administration
Office of Employee Benefits Security
Washington, D.C. 20216

Department of the Treasury
Internal Revenue Service
Washington, D.C. 20224

May 23 1977

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Mr. Herman C. Biegel
Lee, Toomey & Kent
1200 18th Street, N.W.
Suite 812
Washington, D.C. 20036

OPINION 77-44

406(a)(1)(D)
408(b)(2)

Re: Richard – Merrell Retirement Plan
Exemption No. D-186

Dear Mr. Biegel:

This is in response to your submissions of June 18, 1975 and February 8, 1977 on behalf of Richardson - Merrell, Inc. (RMI) and Piedmont Advisory Corporation (Piedmont). In those submissions you requested an administrative exemption under section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1954 (the Code) for the provision of investment advisory services for a fee by Piedmont to the Richardson – Merrell Retirement Plan (the Plan), or, in the alternative, a determination that the described transactions did not constitute prohibited transactions under section 406 of the Act and section 4975 of the Code.

You set forth the following facts and representations. Piedmont is a wholly owned subsidiary of Richardson Corporation (Richcorp). Substantially all of the stock of Richcorp is owned by members of the Richardson family and trusts in which family members have interests. Some of these family members and trusts also own, in the aggregate, a substantial amount of stock in RMI. The Boards of Directors of RMI, Richcorp, and Piedmont have various members in common. The Plan has approximately 6000 participants. Piedmont is an authorized employer under the Plan; approximately 10 employees of Piedmont participate in the Plan. Piedmont was organized and staffed with investment experts for the express purpose of furnishing investment advisory services to its clients,

some of whom are related parties to RMI, on a non-profit basis. Piedmont currently provides investment advisory services to the Plan's Investment Subcommittee which has responsibility for managing Plan assets. The fees which Piedmont charges its clients are determined by allocating Piedmont's costs to each client's account based upon the asset value under advisement for each client. The asset value under advisement for each client is determined by including common and preferred stock at full fair market value, bonds at 50% of fair market value, and RMI stock at 10% of fair market value. You represent that this formula allocates the proportionate investment advisory services provided to each class of assets.

You state that Piedmont has been furnishing investment advisory services to the Plan under the transitional statutory exemption contained in sections 414(c)(4) and 2003(c)(2)(D) of the Act. Sections 414(c)(4) and 2003(c)(2)(D) of the Act postpone until June 30, 1977, the applicability of the prohibited transaction rules of section 406 of the Act and section 4975 of the Code to the provision of services between a plan and a party in interest/disqualified person with respect to the plan if certain requirements described in sections 414(c)(4) and 2003(c)(2)(D) are met.

In your letter of February 8, 1977, you proposed to make certain changes in the above-described facts as they relate to the provision of investment advisory services for a fee by Piedmont to the Plan. The proposed factual changes are: (1) the Board of Directors of RMI and the Board of Directors of Piedmont will contain no directors common to both corporations, (2) Piedmont will not participate in the Plan, (3) ownership of Piedmont will be transferred to and held by individuals none of whom will be a party in interest or disqualified person as defined in section 3(14) of the Act and section 4975(e)(2) of the Code with respect to the Plan other than by reason of the provision of investment advisory services to the Plan by Piedmont, and (4) the cost sharing arrangement between Piedmont, RMI and the Plan will consist solely of an annual reimbursement by RMI to Piedmont of the annual variable expenses incurred by Piedmont which are allocable to investment advisory services provided to the Plan as determined by an independent certified public accountant.

You further state that the Plan will appoint an investment adviser to act as a named fiduciary responsible for directing the Plan trustee with respect to Plan investments and that it is contemplated that the Plan will name Piedmont the investment adviser. If appointed, Piedmont will transmit investment directions directly to the Plan trustee. The Investment Subcommittee of the Plan will no longer have any responsibility for Plan investments.

You asked for a determination whether, if the proposed changes are made, the provision of investment advisory services by Piedmont to the Plan will constitute a prohibited transaction under the Act and the Code by virtue of the fact that Piedmont also provides investment advisory services to other clients who may be parties in interest and disqualified persons with respect to the Plan.

Section 406(a) of the Act provides, in relevant part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he knows or should know that such transaction constitutes the direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest or the direct or indirect use of plan assets by or for the benefit of a party in interest with respect to the plan. See also section 4975(c)(1)(A) through (D) of the Code. The term "party in interest" is defined in section 3(14) of the Act. The term "disqualified person" is defined in section 4975(e)(2) of the Code. Section 406(b) of the Act prohibits a fiduciary with respect to a plan from engaging in certain types of self-dealing and conflicts of interest described in that section. See also section 4975(c)(1)(E) and (F) of the Code.

If the proposed factual changes are made, then, based solely on the representations contained in your submission, it does not appear that the provision of investment advisory services to the Plan by Piedmont constitutes a prohibited transaction under section 406 of the Act and section 4975 of the Code merely because Piedmont also provides investment advisory services to persons who may be parties in interest and disqualified persons with respect to the Plan. However, if, as a matter of fact, the cost sharing arrangement is a direct or indirect use by or for the benefit of a party in interest or disqualified person of any assets in the Plan, the arrangement would constitute a prohibited transaction under section 406(a)(1)(D) of the Act and section 4975(c)(1)(D) of the Code.

Our response relates only to the application of section 406 of the Act and section 4975 of the Code to the proposed transaction. It does not deal with the application of any other provision of the Act or the Code, or the provisions of any other statute, to the proposed transaction. Specifically, our response does not deal with the application of the fiduciary duties set forth in section 404(a)(1) of the Act.

Sincerely,

(Signed) Alan D. Lebowitz

Fred. W. Stuckwisch
Director
Office of Regulatory Standards
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Alan D. Lebowitz
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