U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs
Washington, D.C. 20216

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267

OPINION 77-48

414(c)(5)

Dear Mr. Irish:

By letter dated August 13, 1976, on behalf of your clients, Teledyne, Inc. and the trust established under the Master Trust Agreement for Qualified Plans of Teledyne, Inc. Companies (the Trust) you requested a ruling to the effect that the disposition by the Trust to Teledyne, Inc. of 1,149,650 shares of Teledyne common stock on February 27, 1976, pursuant to a public tender offer, was exempt from the prohibitions of sections 406 and 407(a) of the Employee Retirement Income Security Act of 1974 (the Act) and from taxes imposed by sections 4975(a) and (b) of the Internal Revenue Code of 1954 (the Code) by reason of sections 414(c)(5) and 2003(c)(2)(E) of the Act.

Information submitted in the request disclosed the following facts: Teledyne, Inc. is a publicly-held company primarily engaged in the production and sale of various specialty metal products. Its common stock is listed and traded on the New York Stock Exchange and other national securities exchanges. In 1969 Teledyne entered into a Master Trust agreement creating a single trust to hold the assets of the approximately 55 pension plans maintained by Teledyne, its divisions, and its subsidiaries. Each of these 55 plans is qualified under section 401(a) of the Code and there are approximately 38,900 participants.

On February 27, 1976, the Trust owned 1,149,650 shares of Teledyne common stock having an estimated value of $45,986,000. Of these shares, 1,116,166 were acquired by the Trust before June 30, 1974, and were held by the Trust at all times thereafter until February 27, 1976.

The remaining 33,484 shares were received as the Trust's share of a 3 percent common stock dividend paid on May 26, 1975. This was represented to be a dividend of common on common, nontaxable under section 305(a) of the Code. All 1,149,650 shares were "qualifying employer securities" as defined in section 407(d)(5) of the Act.

The fair market value of all Trust assets on February 27, 1976, was $186,512,000. In addition to the 1,149,650 shares of Teledyne common valued at $45,986,000, the Trust held other qualifying employer securities and qualifying employer real property worth $9,986,000. Together these assets amounted to approximately 30% of the value of the Trust's assets.

On February 9, 1976, Teledyne, Inc. made a public offer to purchase up to 1,000,000 shares of its own common stock for $40.00 cash per share, if the shares were tendered on or before February 27, 1976. The company reserved the right to accept a greater or lesser number of shares. A total of 2,534,531 shares, including all 1,149,650 shares owned by the Trust, were tendered pursuant to this offer. Teledyne, Inc. accepted the tender of all 2,534,531 shares. After the sale, Trust holdings of qualifying employer securities and qualifying employer real property amounted to slightly more than 5% of total Trust assets.

Under section 406(a)(1)(A) of the Act the sale or exchange of property between a plan and a party in interest is a prohibited transaction. Section 3(14)(C) of the Act defines a party in interest as "an employer any of whose employees are covered by such plan." On the basis of the information contained in your request, it is clear that Teledyne is a party in interest with respect to the Trust and that the purchase of these shares by Teledyne from the Trust in the public tender offer constituted a prohibited transaction under section 406(a)(1)(A) of the Act.

Section 414(c)(5) of the Act provides, however, that section 406 of the Act shall not apply to the "sale . . . of property which is owned by a plan on June 30, 1974, and at all times thereafter, to a party in interest, if such plan is required to dispose of such property in order to comply with the provisions of section 407(a) . . . and if the plan receives not less than adequate consideration." You have requested a ruling that the February 27, 1976, sale meets the requirements of that section and is, therefore, exempt from the prohibitions of section 406 of the Act.

The principal issues involved in your request relate to section 407(a) of the Act and the question of what the plan "is required to dispose of . . . in order to comply" with that section. You have asked that we rule that sales made prior to the December 31, 1984, date contained in section 407(a)(3) of the Act are covered by the transitional rule and further that the rule applies to the entire transaction or "block sale" in cases as this one, in which the plan's ownership of qualifying employer securities after the sale is less than the 10 percent limitation of section 407(a)(3).

Section 407(a)(3) does not require a plan to dispose of qualifying employer securities or qualifying employer real property only on December 31, 1984, or only on December 31, 1979, to meet the requirements of section 407(a)(4). This position is consistent with the intent of Congress as expressed in the Conference Committee Report which states that the plan may dispose of enough of its assets to bring its holdings to "no more than 10 percent of plan assets on or before December 31, 1984." See H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 318 (1974). Accordingly, it is the conclusion of the Department that if a plan must dispose of a portion of a class of property in order to comply with section 407(a) of the Act, then on or before December 31, 1984, it may dispose of its entire holdings of such property in one transaction in reliance upon the exemption provided in section 414(c)(5) of the Act.

Finally, we have concluded that for the purposes of section 414(c)(5) of the Act all 1,149,650 shares of Teledyne common, including the 33,484 received as the Trust's share of the nontaxable stock dividend in 1975, were owned by the plan on June 30, 1974, and at all times thereafter. This conclusion does not, however, represent an interpretation of section 407(d)(8) of the Act.

Therefore, based solely on the information and representation contained in your request, we conclude that the sale of all 1,149,650 shares of Teledyne common stock by the Trust to Teledyne on February 27, 1976, was exempt from the prohibitions contained in sections 406 and 407(a) of the Act provided that the Trust received not less than adequate consideration for the shares.

Section 3(18) of the Act defines the term "adequate consideration" in the case of a security for which there is a generally recognized market, and is traded on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, as the price of the security prevailing on such national securities exchange. The determination as to whether in fact the price paid is adequate consideration must be made by the plan trustees or other plan fiduciaries in light of all the relevant facts and circumstances. The Department will not issue an opinion relating to whether certain consideration constitutes adequate consideration. See ERISA Proc. 76-1, Sec 5.02(a) (41 FR 36821, August 27, 1976).

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions