

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



MAR 2 1979

OPINION 79-13 A

Mr. John D. Hintze
Thoma, Schoenthal, Davis,
Hockenberg and Wine
2300 Financial Center
Des Moines, Iowa 50309

407(d)(5)

408(e)

Re: O's Gold Seed Company Employees'
Profit Sharing Plan

Dear Mr. Hintze:

This is in response to your letter requesting an advisory opinion that a proposed transaction involving the above named plan would be exempt from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) by virtue of section 408(e) of the Act.

You represent that O's Gold Seed Company (O's Gold) established a stock bonus plan for its eligible employees in October 1975. The company's contributions to the stock bonus plan were invested primarily in O's Gold common stock, which is traded on the Midwest Stock Exchange. Subsequent to the establishment of the plan, over 50 percent of the outstanding stock of O's Gold was acquired by the Central Soya Corporation (Central Soya).

Central Soya maintains a defined benefit pension plan for its eligible employees. After Central Soya acquired control of O's Gold, the board of directors of O's Gold decided in October 1976 to convert the stock bonus plan to a profit sharing plan (the Plan) and, in October 1977, to terminate the Plan and to establish a defined benefit pension plan for O's Gold employees.

The board of directors of O's Gold and the administrative committee of the Plan decided to make a cash distribution rather than a distribution of O's Gold stock on termination of the Plan. The decision was based largely on the fact that the stock previously held by the stock bonus plan was restricted stock which might have to be sold pursuant to the requirements of Rule 144 of the Securities and Exchange Commission following distribution. Moreover, the participants probably would have to pay brokerage commissions on subsequent sale of the stock.

In order to avoid the above problems to participants, and because a stock bonus plan may distribute only employer stock, the stock bonus plan was converted to a profit sharing plan. In May 1978, the Plan was submitted to the Internal Revenue Service for a determination of its qualified status upon termination. No response had been received from the Internal Revenue Service as of the date of your letter.

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The stock bonus plan and O's Gold made an agreement that O's Gold would purchase the O's Gold stock from the Plan after its conversion from a stock bonus plan to a profit sharing plan. The price paid would be the numerical average of the closing price of O's Gold stock on the Midwest Stock Exchange for the five trading days preceding the date of execution of the sale agreement.

You represent that the Plan is an "eligible individual account plan" as that term is defined in section 407(d)(3) of ERISA and ask whether the sale of the O's Gold stock from the Plan to O's Gold falls within the statutory exemption of section 408(e) of ERISA.

Section 406(a)(1)(A) of ERISA prohibits the sale or exchange of property between a plan and a party in interest. Section 3(14)(C) defines the term "party in interest" to include an employer any of whose employees are covered by the plan. Sections 406(b)(1) and (2) of ERISA prohibit a fiduciary with respect to a plan from dealing with the assets of the plan in his own interest or for his own account; or acting, in his individual or in any other capacity, in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. However, section 408(e) provides, in relevant part, that section 406 shall not apply to the sale by an eligible individual account plan of qualifying employer securities, if such sale is for adequate consideration and if no commission is charged with respect thereto.

Section 407(d)(5) of ERISA defines the term "qualifying employer security" to include an employer security which is stock. According to section 407(d)(1), the term "employer security" includes a security issued by an employer of employees covered by the plan. O's Gold is the employer of the employees covered by the Plan. Therefore, we conclude that the stock of O's Gold is a qualifying employer security and that the statutory exemption of section 408(e) would be available if the conditions of that section are met.

Regarding the first condition of section 408(e), section 5.02(a) of ERISA Procedure 76-1 states that the Department ordinarily will not issue an advisory opinion on whether certain consideration constitutes "adequate consideration". For that reason, we will not rule on whether the transaction described in your letter would be for adequate consideration. Based on your representation that no commission will be charged on the transaction, we conclude that the second condition will be met.

If the Plan, therefore, were to receive adequate consideration for the O's Gold stock, section 408(e) would exempt the sale of the stock from the

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prohibitions of sections 406(a) and 406(b) (1) and (2) of ERISA. Based on the facts and representations contained in your submission, it does not appear that the prohibitions of section 406(b) (3) would be applicable to the proposed transaction.

Our consideration of the proposed transaction does not relate to any provisions of ERISA not discussed in this letter. Thus, for example, we are not rendering any opinion on whether the transaction is consistent with the general fiduciary responsibility provisions of section 404 of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, the letter is issued subject to the provisions of the procedure, including section 10 which governs the extent to which a person may rely on an advisory opinion.

Sincerely,

Alan D. Lebowitz
Acting Assistant Administrator
Office of Fiduciary Standards