

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



MAR 12 1979

OPINION 79-15 A

Mr. Homer L. Elliott
Drinker Biddle & Reath
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19107

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3(2)

Dear Mr. Elliott:

This is in reply to your letter requesting an advisory opinion concerning whether title I of the Employee Retirement Income Security Act of 1974 (ERISA) is applicable to the Betz Laboratories, Inc. Employee Stock Incentive Plan (the Plan). Specifically, your inquiry concerns whether the Plan is an employee welfare benefit plan or an employee pension benefit plan, or both, within the meaning of section 3(3) of ERISA.

You represent that the Plan provides for issuance of common stock of Betz Laboratories, Inc. (the Company) to key employees, including officers and directors who are employees, selected by the Stock Incentive Committee which is appointed by the Company's Board of Directors. All current participants are employees earning \$25,000 or more per annum. Employees selected by the Committee (grantees) receive shares of Company stock at no expense to the individual employees. From the date the stock is issued, grantees have all rights of shareholders, including dividend and voting rights, except that certificates for the shares are held by the Company Treasurer until certain restrictions described below lapse. Stock, granted in accordance with the Plan, is subject to restrictions on disposition (namely, grantees are prohibited from selling, assigning, or transferring the stock granted) until lapse of such restrictions. Unless the Stock Incentive Committee determines that the percentage will be less or the period before lapse will be longer, restrictions lapse on 50 percent of shares granted on a date 3 years after the original grant and, thereafter, at the discretion of the Stock Incentive Committee. With regard to stock granted under the Plan to date, the Committee has generally provided for lapse of restrictions on one-third of shares issued on each of three dates: the third, fourth, and fifth anniversaries of the grant.

Stock on which restrictions have not yet lapsed is forfeited and reverts to the Company when the grantee's full-time employment with the Company or its subsidiary terminates for any reason. Death of the grantee after 3 years from the date of the stock grant causes

-2-

all restrictions, which had not previously lapsed, to lapse at the time of death, unless the Stock Incentive Committee has fixed a later date, in which case the later date will determine whether the restrictions lapse at the grantee's death or whether the shares will be forfeited and revert to the Company.

The Plan is not qualified for special tax treatment under any provision of the Internal Revenue Code. You state that under section 83 of the Internal Revenue Code, transferees of stock granted in accordance with the Plan may elect to defer recognition of taxable income to the date the restrictions lapse due to the substantial risk of forfeiture involved or may elect that taxable income be recognized at the time of the grant.

An "employee benefit plan" is defined in section 3(3) of ERISA as " . . . an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

An "employee welfare benefit plan" is defined in section 3(1) of ERISA as " . . . any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)."

Because the Plan is maintained solely to provide employees with shares of Company stock which is not among the purposes listed in ERISA section 3(1), the Plan is not an employee welfare benefit plan within the meaning of ERISA section 3(1).

An "employee pension benefit plan" is defined in section 3(2) of ERISA as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

(A) provides retirement income to employees, or

-3-

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Because the Plan does not, by its express terms, provide retirement income or result in a deferral of income for periods extending to the termination of covered employment or beyond, it is the Department's position, based on the information submitted, that the Plan is not, by its express terms, an employee pension benefit plan. We note however, that because, among other things, the Stock Incentive Committee has discretion with respect to when restrictions on disposition will lapse, the Plan may, as a result of surrounding circumstances, provide retirement income or result in a deferral of income to the termination of covered employment or beyond. Since the question as to whether the Plan is a pension plan as a result of surrounding circumstances involves a factual determination, the Department will not render an opinion on that question. See section 5 of ERISA Procedure 76-1.

This letter constitutes an advisory opinion as defined in ERISA Procedure 76-1, copy enclosed. Accordingly, this letter is issued subject to the provisions of such procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

Enclosure