

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



MAR 26 1979

OPINION 79-23 A

Mr. Edward V. Mills, Jr.
Dunne, Phelps & Mills
601 California Street
San Francisco, California 94108

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407 (d) (5)
408 (e)

Dear Mr. Mills:

This is in response to your letter requesting an advisory opinion regarding application of the Employee Retirement Income Security Act of 1974 (ERISA).

Specifically, you request an opinion that a proposed sale of common stock of the California Casualty and Life Insurance Company (the Life Company) by the California Casualty Management Company Savings Investment Plan (the Plan) to the California Casualty Management Company (the Management Company) would not be prohibited by section 406 of ERISA. If the transaction is prohibited, you request an opinion that it is exempted by the provisions of section 408(e) of ERISA.

You represent that the Management Company owns 62 percent of the common stock of the Life Company. All of the agents producing business for the Life Company are employees of the Management Company. During 1976, the Management Company and the Life Company determined that the Life Company's Production Bonus Trust (the Trust) should be merged into the Plan. The merger was effective as of January 1, 1977.

The assets of the Trust had been divided into two parts. Part A consisted mainly of common stock of the Life Company. This stock is not listed on any exchange and has no generally recognized market. It is evaluated by an independent consulting actuary according to a formula designed to approximate fair market value.

2.

The Management Company and the Life Company intended that the merger would result in the assets of the Trust being transferred to the funding medium of the Plan. That funding medium is a group annuity contract issued by the Equitable Life Assurance Society. Equitable informed the Management Company that the stock of the Life Company would not meet its investment criteria and therefore would not be acceptable for inclusion in the funding medium of the Plan. Accordingly, the stock was temporarily put into a separate funding medium of the Plan until it could be converted to cash. Subsequently, the cash proceeds of a sale of the stock would be transferred to the principal funding medium of the Plan.

Since the Life Company stock has no generally recognized market, the Management Company is willing to purchase the stock at the currently assessed fair market value. You note that, unless the stock is sold in the proposed manner, the portion of Plan assets now held in a separate funding medium will not be available to the Plan for payment of benefits.

Section 3(14)(C) of ERISA defines the term "party in interest" to mean, as to an employee benefit plan, an employer any of whose employees are covered by such plan. Section 406(a)(1)(A) states 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 a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest. Accordingly, we conclude that the Management Company is a party in interest with respect to the Plan and that, without an exemption, the proposed transaction would be prohibited.

You ask whether the statutory exemption of section 408(e) of ERISA would permit the proposed transaction. This section states that:

Sections 406 and 407 shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4))--

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1)),

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- (2) if no commission is charged with respect thereto, and
- (3) if--
 - (A) the plan is an eligible individual account plan (as defined in section 407(d)(3)), or
 - (B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a).

Section 407(d)(5) of ERISA defines the term "qualifying employer security" to include an employer security which is stock. Section 407(d)(1) defines the term "employer security" to include a security issued by an affiliate of an employer of employees covered by the plan. A corporation is an affiliate of an employer under section 407(d)(7) if it is--

A member of any controlled group of corporations (as defined in section 1563(a) of the Internal Revenue Code of 1954, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation.

Section 1563(a) of the Code defines a controlled group of corporations, in relevant part, to include--

One or more chains of corporations connected through stock ownership with a common parent corporation if--(A) stock possessing. . .at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned. . .by one or more of the other corporations; and (B) the common parent corporation owns. . .stock possessing. . .at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations.

As mentioned earlier, the Management Company owns 62 percent of the common stock of the Life Company, which is the only class of stock issued by the company. Therefore, we conclude that the common stock of the Life Company is a qualifying employer

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security and that the statutory exemption of section 408(e) would exempt the proposed transaction from the prohibitions of section 406(a) and 406(b)(1) and (2) if the various conditions of the section are met. Based upon your submission, it does not appear that the proposed transaction would contravene the prohibition of section 406(b)(3).

Regarding the first condition of section 408(e), section 5.02(a) of ERISA Procedure 76-1 provides 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. Based on your representation that the plan is an "eligible individual account plan" as defined in section 407(d)(3), we conclude that the third condition is met.

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.

Under Reorganization Plan No. 4 of 1978 (Executive Order 12108, 44 FR 1065) effective December 31, 1978, the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor, and the Secretary of the Treasury shall be bound by the rulings issued by the Secretary of Labor pursuant to such authority.

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,

Ian D. Lebowitz
Acting Assistant Administrator
Office of Fiduciary Standards