

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



May 8 1979

Mr. William K. Howell
Senior Vice President and Trust Officer
Blount National Bank
P.O. Box 608
Maryville, Tennessee 37801

OPINION 79-27 A

407(a)

Dear Mr. Howell:

This is in reply to your letter asking whether the stock of the Southeastern Life Insurance Company (Southeastern), wholly owned and held by the Blount National Bank Retirement Trust (the Trust) constitutes qualifying employer securities under the Employee Retirement Income Security Act of 1974 (ERISA). You also ask whether you are correct in your understanding that the Trust will have met the 10 percent limitations of section 407(a) of ERISA with respect to the holding of qualifying employer securities if its holdings of qualifying employer securities are not more than 10 percent of the Trust's assets by December 31, 1978.

You have submitted a copy of an Opinion of Counsel dated August 22, 1975. The facts stated in such Opinion include, among others, the following:

On or about January 26, 1973, a reinsuring life insurance company was formed by the Trustee, as authorized by the Plan, under the statutes of the state of Arizona, the company being organized under the name of Southeastern Life Insurance Company (Southeastern). All of the capital stock of Southeastern was purchased by the Trustee as a part of the corpus of the Trust on January 26, 1973, and the Trust currently holds that same ownership. The Southeastern investment comprises approximately six (6%) percent of the total Trust, at cost.

You have also submitted a copy of your letter dated February 17, 1977, addressed to Mr. Dean E. Miller, Deputy Comptroller for Trust Operations, Comptroller of the Currency, which states in part:

The Blount National Bank Retirement Fund is the owner of 100% of the common, capital stock of Southeastern Life Insurance Company, and therefore, the fund receives all of the benefits of the operations of Southeastern Life Insurance Company. No stock other than common stock in the company exists. In no

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way is the company a subsidiary or an employer security, but it is, in fact, an independently owned corporation for the exclusive and sole benefit of the participants of the retirement plan.

In your letter to this office, you explained that although at that time the holdings of Southeastern and parent company stock combined in the Trust exceeded 10 percent of the Trust's assets, you calculated that by December 31, 1978, the holdings would be within the 10 percent limitation required by ERISA.

Section 407(d)(5) of ERISA defines the term "qualifying employer security" as an employer security which is stock or a marketable obligation (as defined in section 407(e)). The term "employer security" is defined in section 407(d)(1) as a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. For this purpose, section 407(d)(7) states that a corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of the Internal Revenue Code of 1954, with an exception regarding percentages of ownership that is not relevant to this case).

Since the information submitted does not indicate whether Southeastern is an employer of employees covered by the Trust, we cannot express an opinion as to whether shares of Southeastern stock are qualifying employer securities, within the meaning of section 407(d)(5). We note, however, that if Southeastern is neither an employer of employees covered by the Trust nor a member of a controlled group of corporations of which the employers who maintain the Trust are members, Southeastern stock would not be a qualifying employer security.

Regarding your question concerning the 10 percent limitations, section 407(a)(3)(A) of ERISA prohibits a plan from holding, after December 31, 1984, any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of -- (i) the fair market value of the assets of the plan, determined on December 31, 1984, or (ii) the fair market value of the assets of the plan determined on January 1, 1975. Section 407(a)(3)(B) explains that the requirements of section 407(a)(3)(A) shall not apply to any plan which on any date after December 31, 1974, and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of (i) the fair market value of the assets of the plan, determined on such date, or (ii) the fair market value of the assets of the plan determined on January 1, 1975. The example in section 2550.407a-3(b)(2) of the Department's regulations shows how the 10 percent rules apply to a plan whose investments in qualifying employer securities and qualifying employer real property equal

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10 percent of the fair market value of the plan's total assets before December 31, 1979. Section 407(a)(4) of ERISA and section 2550.407a-4 of the Department's regulations require plans to divest half of the amount of the holdings of such property exceeding the 10 percent limitation of section 407(a)(3) by December 31, 1979, and the remainder by December 31, 1984. A copy of the regulations under section 407(a) is enclosed for your convenience.

Pursuant to section 407(a)(3)(B), therefore, you are correct in your understanding that the Trust will have met the 10 percent limitation requirements if no more than 10 percent of the fair market value of the Trust assets were invested in qualifying employer securities and qualifying employer real property by December 31, 1978, although the Trust does have until December 31, 1984, to reach such 10 percent limitation. If, however, the 10 percent limitation is not met on or before December 31, 1979, the Trust would be subject to the 50 percent divestiture rule of section 407(a)(4) (assuming, in the absence of information submitted to the contrary, that the Trust is subject to the limitations of section 407(a) -- see section 407(b) regarding the exclusion from these limitations for eligible individual account plans). Note that if the Southeastern stock in this case does not constitute qualifying employer securities under section 407(d)(5), such stock is not subject to the 10 percent limitations of section 407(a) in this case.

The Opinion of Counsel dated August 22, 1975, discusses the following questions:

(1) Does the fact that the officers and directors of Southeastern are common with Blount National Bank (the Bank) constitute self-dealing or otherwise indicate an improper relationship as between the parties?

(2) Does the fact that Southeastern holdings partially consist of investments in certificates of deposit issued by the Bank constitute self-dealing or an otherwise improper investment?

(3) Do the relationships described in (1), above, or the investments described in (2), above, violate any provisions of ERISA?

Although you have not requested our comments on the questions discussed in the above-mentioned Opinion of Counsel, we believe the following general information may be of interest to you in these matters.

Regarding question (1), section 406(b)(2) of ERISA prohibits a fiduciary of an employee benefit plan from 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. Nevertheless,

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section 408(c)(3) permits a plan fiduciary to serve as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest with respect to the plan. The enclosed copy of our Advisory Opinion 77-45 dated June 7, 1977, explains how these two sections of ERISA apply when a plan trustee also serves on the board of directors of the bank which is the custodian of the plan's assets.

Regarding questions (2) and (3), ERISA Interpretive Bulletin 75-2 (copy enclosed) provides, among other things, that if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and a corporation will ordinarily be a prohibited transaction if the plan may by itself require the corporation to engage in such transaction. However, if the transaction involves the investment in a certificate of deposit issued by a bank which is a party in interest with respect to the plan, an exemption may be available for such transaction under section 408(b)(4) and section 2520.408b-4 thereunder, if certain conditions are satisfied.

Sincerely,

Alan D. Lebowitz
Assistant Administrator
Office of Fiduciary Standards

Enclosures (3)
Section 407 Regulations
Interpretive Bulletin 75-2
Advisory Opinion 77-45