

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



JUN 13 1979

Mr. Ethan Lipsig
Latham & Watkins
555 South Flower Street
Los Angeles, California 90071

OPINION 79-37 A

3 (14) (G)
406

Dear Mr. Lipsig:

This is in response to your request on behalf of the Utility Trailer Manufacturing Company (Utility) regarding possible prohibited transactions under the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you inquire whether certain corporations are "parties in interest" with respect to the Employees' Profit-Sharing Plan of Utility Trailer Manufacturing Company and Affiliated Companies (the Plan).

Your letter contains the following representations in support of the requested opinion. Utility (the Plan sponsor), with its subsidiaries, is engaged in the manufacture of truck-trailers. These truck-trailers are then sold through a nationwide system of over fifty independent sales agencies (individually or collectively, the Dealer(s)). If a favorable opinion is issued, Plan fiduciaries intend to enter into a variety of transactions with certain of the Dealers. Such transactions would include loans of plan assets to the Dealers and purchases of customer notes from the Dealers. Prior to ERISA, the Plan had customarily engaged in such transactions with Utility, the Dealers and their customers. Utility owns stock in many of the Dealers; however, with only one exception (not a party to this request), Utility (together with its subsidiaries, employees, shareholders and the Plan) owns less than one-half of the outstanding stock whether by value, voting power or class of any of the Dealers. Utility has entered into a stock option agreement with some of the Dealers which, if exercised, would enable Utility "to purchase that number of shares which, following exercise and, together with the shares then owned by [Utility], will constitute one share more than fifty percent of the shares outstanding [of that Dealer] after exercise". The options have been acquired so as to permit Utility to prospectively discontinue a relationship with a Dealer which Utility would find unacceptable for either financial or other business reasons. None of the Dealers sponsor or maintain the Plan

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nor are any of the Dealers' employees participants in the Plan.

The issue on which you seek an advisory opinion is whether the availability of the option, (the exercise of which would permit Utility to obtain one share more than fifty percent control over any one of the Dealers) would result in such Dealers being a party in interest under section 3(14)(G) and would result in the proposed transactions between the Plan and the Dealers becoming prohibited transactions under the provisions of section 406 of ERISA.

For purposes of this opinion, the relevant provisions of section 3(14) of ERISA, which defines a party in interest, are as follows:

The term "party in interest" means, as to an employee benefit plan --

. . . (C) an employer any of whose employees are covered by such plan; . . .

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of --

(i) the combined voting power of all classes of stock entitled to vote or the total value of all shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D) or (E); . . .

The Secretary, after consultation and co-ordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than fifty percent for subparagraph (E) and (G)

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Thus, under section 3(14)(C) of ERISA, Utility would be a party in interest with respect to the Plan.

Section 4975(e)(2) of the Internal Revenue Code (the Code) in defining the term "disqualified person" contains essentially parallel language to the above-quoted provisions of Title I of ERISA. However, section 4975(e)(4) of the Code provides, in part, as follows:

- (4) Stockholdings - For purposes of paragraphs 2(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c). . .

This referenced attribution rule is limited to the Code provisions inasmuch as there are no parallel provisions under Title I. Although the Department does not have the authority to interpret this provision of the Code, under a literal reading, the provisions of Code section 267(c) do not appear to be germane to the resolution of the issue presented in this case.

It is the opinion of the Department that the Dealers are not currently parties in interest with respect to the Plan within the meaning of section 3(14)(G) of ERISA solely by reason of the fact that Utility may, at some future time, exercise an existing option which would result in the acquisition of one share more than a fifty percent interest in any of the Dealers.

You further represent that Utility has no intention to exercise such options absent the problems mentioned above and that in the event such option is exercised, Utility would promptly seek an unrelated person(s) to assume control of the Dealer and sell enough stock to such person(s) so as to reduce Utility's ownership of that Dealer's stock below fifty percent. However, should Utility exercise the option in question, to the extent that the Dealer involved had entered into loan or customer note transactions with the Plan that were outstanding at that time, Utility would be considered to have engaged in a prohibited transaction under section 406 of ERISA.

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Moreover, irrespective of whether Utility has or acquires a sufficient interest in a Dealer so as to render such Dealer a party in interest, the underlying proposed transactions, under which plan fiduciaries cause Plan assets to be, e.g., loaned to a Dealer, might result in prohibited transactions. Thus, section 406(a)(1)(D) of ERISA prohibits a plan fiduciary from causing the plan to engage in a transaction if he knows or should know that the transaction constitutes a direct or indirect use of plan assets for the benefit of a party in interest. Section 406(b) of ERISA delineates prohibited acts of self-dealing by a plan fiduciary. If, for example, the transaction in question was entered into to encourage or permit a Dealer to do business with Utility, these prohibitions would be applicable. A determination of whether such violations would exist would depend on the identity of the fiduciaries, their relationship to Utility and the circumstances under which plan assets are used in such transactions.

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. Accordingly, we conclude that the views set forth above apply also under the Code to the extent that such views relate to Code section 4975.

Sincerely,

Alan D. Lebowitz
Assistant Administrator
Office of Fiduciary Standards