

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



JUL 18 1979

OPINION 79-45 A

407(d) (5)

Mr. Paul F. McAlenney
Day, Berry & Howard
One Constitution Plaza
Hartford, Connecticut 06103

Re: The Advest Group, Inc.
Identification Number: F-0884A

Dear Mr. McAlenney:

This is in response to your letter of March 30, 1979, in which you request an advisory opinion as to whether, under the facts presented, convertible debentures constitute "qualifying employer securities" within the meaning of section 407(d) (5) of the Employee Retirement Income Security Act of 1974 (ERISA).

Your letter contains the following representations. The Advest Group, Inc. Employee Stock Ownership Plan (ESOP) is a stock bonus plan qualified under section 401(a) of the Internal Revenue Code of 1954. It is proposed that the ESOP invest in convertible debentures (debentures) issued directly by The Advest Group, Inc. (AGI). Such debentures will not be traded on a national securities exchange and will not be purchased or held by any significant number of independent persons. The debentures may be converted into common stock of AGI upon 30 days notice by the holder.

The issue on which you seek an advisory opinion is whether the "convertibility" of the above-described debentures would result in the Department's considering such debentures to be "stock" within the meaning of section 407(d) (5) of 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 subsection (e)). In this regard, you have indicated that the debentures will

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be "employer securities" within the meaning of section 407 (d) (1) of ERISA. Your letter further states that the debentures will not be "marketable obligations" as defined in section 407(e) of ERISA inasmuch as the debentures will not be issued to a significant number of persons independent of the issuer.

It is the opinion of the Department that the debentures do not constitute "stock" within the meaning of section 407(d) (5) of ERISA. This result would not be altered by reason of the fact that the ESOP may, at some future time, exchange such debentures for the common stock of AGI. To the extent, then, that the debentures do not constitute "qualifying employer securities" as defined in section 407(d) (5) of ERISA, they are subject to the restrictions against the acquisition of employer securities under sections 406(a) (1) (E) and 407(a) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

We considered your request for a conference under section 8 of the procedure and determined that, in light of the precise legal issue framed by your request, a conference would not be required for the issuance of this advisory opinion.

Sincerely,

Alan D. Lebowitz
Assistant Administrator
Office of Fiduciary Standards