**U.S. Department of Labor**

Labor-Management Services Administration
Washington, D.C. 20216

OPINION 80-43A
406(a)(1)(B)

JUL 15, 1980

Mr. Douglas B. Kramer
Young & Alexander Co., L.P.A.
Suite 100
367 West Second Street
P.O. Box 578
Dayton, Ohio 45402

Dear Mr. Kramer:

This is in response to your letter of September 29, 1979 requesting an advisory opinion on behalf of Capitol Plumbing and Heating Supply Co. ("Capitol") and the Capitol Plumbing Profit-Sharing and Thrift Trust (the "Trust") that certain transactions do not constitute prohibited transactions under the Employee Retirement Income Security Act of 1974 ("ERISA").

Your letter sets forth the following facts describing the transactions at issue. Capitol, the employer, is a wholesaler of plumbing related supplies in Illinois. More than fifty percent of the stock of Capitol is owned by Mr. Lee Drendel. Mr. Drendel, his son, and an unidentified third person are the trustees of the Trust. You represent that Mr. Drendel is deemed to own 8.4% of the total issued and outstanding voting stock of Financial Management Services, Inc. ("FMSI") and 11% of the total issued and outstanding non-voting stock of FMSI. His ownership of the total issued and outstanding stock of FMSI is 8.5%. We assume that Mr. Drendel's deemed ownership of FMSI was calculated by taking into account the provisions of section 4975(e)(4) of the Internal Revenue Code of 1954 ("the Code"), regarding the attribution of stock ownership. Mr. Drendel is also a director of FMSI.

FMSI provides financing services to customers of plumbing wholesalers, including Capitol, that have entered into a membership agreement with FMSI. The membership agreement requires the wholesaler to guarantee loans and also requires their maintenance of a reserve account with FMSI. FMSI may also, in the future, finance the activities of the wholesalers. The funds for FMSI's activities come from its own capital and from the sale of its own short term notes.

The Trust proposes to invest $100,000 in short term (9 months or less to maturity) notes issued by FMSI. The notes will bear interest at a rate which takes into account rates on certificates of deposit, treasury bills and commercial paper and which is set to make it more attractive than such rates. No security interest will be issued in connection with such notes. You represent that FMSI makes loans to a member's customers, and contemplates making loans to members, in accordance with formulas based on certain specified criteria, and that FMSI does not take into consideration, in granting such loans, the investments in FMSI by the member or its related parties.

You have requested an advisory opinion that the investment by the Trust in FMSI notes and the subsequent unrelated lending of money by FMSI to Capitol or its customers, do not constitute the direct or indirect lending of money or other extension of credit between a plan and a party in interest prohibited under section 406(a)(1)(B) of ERISA or section 4975(c)(1)(B) of the Code.

A party in interest with respect to a plan is defined by section 3(14) of ERISA as, among others, a fiduciary of a plan, an employer of employees covered by the plan, an owner of 50% or more of the stock of the employer, or a corporation 50% or more of which is owned by a 50% or more owner of the employer.

Thus Capitol as the employer, the Trustees, and Mr. Drendel, as owner of more than 50% of the stock of Capitol, are all parties in interest with respect to the Trust. FMSI, however, is not a party in interest with respect to the Trust by reason of Mr. Drendel's ownership of 8.5% of the total issued and outstanding stock of FMSI.

The proposed investment by the Trust in short term notes of FMSI is not, therefore, a direct lending of money or other extension of credit between the plan and a party in interest. Furthermore, in the event of an investment by the Trust in the short term notes of FMSI, the property of FMSI would not become plan assets by reason reason of the investment. Therefore, a loan by FMSI to Capitol, in the absence of some arrangement or understanding that the loan is conditioned on the Trust's investment in FMSI notes, will not be a lending of money or other extension of credit between the plan and a party in interest prohibited by section 406(a)(1)(B) of ERISA and section 4975(c)(1)(B) of the Code.

You have also requested an advisory opinion that these transactions are not prohibited by section 406(a)(1)(D) of ERISA and section 4975(c)(1)(D) of the Code, which prohibit the use of plan assets for the benefit of a party in interest. If the Trust's investment in the short term notes of FMSI were a factor in determining whether FMSI made loans to Capitol or its customers, the investment would be a prohibited use of the plan assets.

In addition, you have requested the Department's opinion that these acts would not constitute acts by which a fiduciary deals with the assets of a plan in his own interest or for his own account or acts in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan, its participants and its beneficiaries. Such transactions would be prohibited under section 406(b)(1) and 406(b)(2) of ERISA and section 4975(c)(1)(E) of the Code.

These prohibitions are imposed upon fiduciaries to deter them from exercising the authority, control or responsibility that makes them fiduciaries when they have interests which may conflict with the interests of the plans for which they act. It appears that in this case Mr. Drendel, and his son, as plan fiduciaries may have an interest in the proposed transaction that may effect the exercise of their best judgment as fiduciaries.

Because of the inherently factual nature of these questions, the Department will not issue an advisory opinion with respect to whether the proposed transactions are prohibited by section 406(a)(1)(D), 406(b)(1) or (b)(2) of ERISA, and by section 4975(c)(1)(D) or (E) of the Code.

The Department has not considered whether the proposed investment decision complies with the general fiduciary duties of section 404 of ERISA, including prudence and diversification of investments, and is not hereby rendering an advisory opinion with respect to the issues raised by the section.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs