



OPINION 80-48A  
414(c)(2) & (3)

AUG 12 1980

Mr. Russell D. Chapman  
Phillips Petroleum Company  
1260 Adams Building  
Bartlesville, Oklahoma 74004

Dear Mr. Chapman:

This is in response to your letter of August 15, 1978, requesting an advisory opinion that the proposed sale of a 51 percent stock interest in the Powder River Corporation (Powder River) by the Retirement Income Plan for Phillips Petroleum Company and Subsidiary and Affiliated Companies (the Plan) to Phillips Petroleum Company (the Employer) is exempt from the restrictions of section 406 and 407(a) of the Employee Retirement Income Security Act of 1974 (ERISA) by reason of the transitional rules contained in section 414(c) of ERISA.

You represent that Powder River currently has 100 shares of common stock issued and outstanding. The Plan acquired a 51 percent interest (51 shares) in Powder River through a contribution of stock by the Employer in December, 1972. The Employer has retained a 49 percent interest (49 shares) in Powder River. The sole asset of Powder River consists of an interstate common carrier pipeline used to transport natural gas liquids. The Employer is the only shipper currently using the pipeline under an agreement dated November 1, 1972. You state that the only liabilities to be transferred in the proposed sale of stock are those directly related to the construction and operation of the pipeline. On this basis, you represent that the sale of stock will have the same economic effect as the sale of the pipeline itself.

Section 406(a)(1)(A) of ERISA provides 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 a plan and a party in interest.

Section 3(14) of ERISA defines the term "party in interest" to include an employer any of whose employees are covered by a plan. Accordingly, since the Employer is a party in interest with respect to the Plan, the proposed sale of the Powder River stock held by the Plan to the Employer would constitute a prohibited transaction in the absence of a statutory exemption.

However, section 414(c)(3) of ERISA provides, in pertinent part, that section 406 and 407(a) of ERISA shall not apply until June 30, 1984, to the sale, exchange, or other disposition of property described in section 414(c)(2) between a plan and a party in interest if in the case of a sale, exchange or other disposition of the property by the plan to the party in interest, the plan receives an amount which is not less than the fair market value of the property at the time of such disposition.

For purposes of section 414(c)(3) of ERISA, a lease or joint use of property by a corporation and a party in interest, under circumstances where the plan owns a controlling interest in the stock of a corporation, will be treated as the lease or joint use of property described in section 414(c)(2) of ERISA by the plan and the party in interest. On the basis of the information submitted, it is our opinion that the sale of the Plan's interest in the stock of Powder River, whose only significant asset is subject to a lease or joint use with the Employer, would have the same economic effect as the sale of the underlying asset. Accordingly, it is the Department's opinion that the relief provided by section 414(c)(3) of ERISA would be applicable to the sale, by the Plan to the Employer of the Powder River stock if, in fact, the Plan's 51 percent represents a controlling interest in Powder River and if the conditions of section 414(c)(3) are otherwise met.

Section 5.02(a) of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976) states that the Department ordinarily will not issue advisory opinions with regard to questions which are inherently factual in nature. For that reason, the Department will offer no opinion as to whether the transaction described in your letter would be for “fair market value” at the time of such disposition.

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 as to whether the conditions of section 414(c)(2) of ERISA have been met.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, the authority of the Secretary of the Treasury to issue rulings under section 2003(c) of ERISA has been, with certain exceptions not here relevant, transferred to the Secretary of Labor and the Secretary of the Treasury is bound by the rulings issued by the Secretary of Labor pursuant to such authority. Therefore, this letter is issued solely by the Department.

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

Sincerely,

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