

U.S. Department of Labor

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



OPINION 80-55A
407(d)(7)

SEP 23 1980

Mr. Christopher J. Sues
Shea & Gould
330 Madison Avenue
New York, New York 10017

Identification No. F-1470A

Dear Mr. Sues:

This is in response to Mr. Roger Cukras' letter of February 1, 1980, and your letter of May 29, 1980, requesting an advisory opinion under the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that Escher Wyss Manchester (Escher) is a joint venture of which 65 percent is owned by a wholly owned corporate subsidiary of Diamond International Corporation (Diamond) and 35 percent is owned by a wholly-owned corporate subsidiary of Sulzer Bros. Inc. (Sulzer). You indicate that there is no known ownership, direct or indirect, between Diamond and Sulzer. Pursuant to the joint venture agreement by which Escher was established, ultimate control over the management and policies of Escher resides in a committee called the Management Committee of the Joint Venture (Committee). The Committee consists of seven members, four of whom are designated by the Diamond subsidiary and three of whom are designated by the Sulzer subsidiary. Four of the members of the Committee constitute a quorum, provided that at least half of the members present and voting are members designated by the Diamond subsidiary. Committee decisions are made by a majority vote of the members present, except that in certain areas, considered generally to be beyond the business purpose of Escher, an unanimous vote of all members of the Committee is required.

You request an advisory opinion that the common stock of Diamond would constitute a "qualifying employer security" within the meaning of ERISA section 407(d) with respect to a savings and stock bonus plan which Escher proposes to adopt for its employees.

Under paragraphs (1) and (5) of section 407(d), the term "qualifying employer security" is defined to include, as relevant here, a security which is stock issued by an affiliate of an employer whose employees are covered by the plan. Paragraph (7) of the same section provides that, as relevant here, an employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary of Labor.

Regulations under paragraph (7) of section 407(d) have not been issued. However, the Department of Labor has discretion to issue an advisory opinion in the absence of regulations if an issue is presented on which the answer seems to be clear. See section 5.03 of ERISA Procedure 76-1. Based on the representations contained in the submissions, we conclude that Diamond would be an affiliate of Escher under the ERISA provisions cited above. Therefore, the common stock of Diamond would constitute a qualifying employer security with respect to a plan adopted by Escher.

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

Sincerely,

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